Apl 8. 79. arg'd N. H. Swayne

9 Otto 201
Oct. 2. 1878.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 211.

WELLINGTON GODDEN AND JAMES L. APPERSON ET AL., APPELLANTS,

vs.

MARY A. S. KIMMELL, ADMINISTRATRIX OF A. F. KIMMELL, DECEASED, WILLIAM L. KIMMELL, ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 10, 1876.

SUPREME COURT OF THE UNITED STATES

No. 211.

WELLINGTON GODDEN AND JAMES L. APPERSON ET AL., APPELLANTS,

vs.

MARY A. S. KIMMELL, ADMINISTRATRIX OF A. F. KIMMELL, DECEASED, WILLIAM L. KIMMELL, ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Original bill	1	1
Exhibit A. Deed of trust, Walker to Willett	13	2
Subpœna	26	7
Marshal's return	27	7
Answer to bill	28	7
Answer of James P. and Robert Willett	43	11
Replication	44	11
Order of publication	45	11
Proof of publication	45	12
Answer of Parris Walker	47	12
Order appointing guardian ad litem	51	13
Answer of infants by guardian ad litem	52	14
Replication to answer of infants	53	14
Order extending time for taking testimony	54	14
Order extending time for taking testimony	54	15
Agreement that commission issue	55	15
Order extending time for taking testimony	58	16
Order to take testimony	59	16
Testimony for complainants	60	16
Exhibit Plaintiff 1—deed, Gadsby to Walker and al	61	17
2—deed, Moffit, trustee, to Walker and al	69	19
3—deed, Gadsby to Walker and al	75	20
4—deed of trust, Walker and al. to Willett	79	21
5—deed of trust, Kimmell to Lambell	87	23
6—deed, Foulke to Kimmell	99	26
Commission to take testimony	104	27
Interrogatories to be propounded by commissioner	105	28
Exhibit B—interrogatories	105	28
Exhibit Z—deed of trust, Walker to Willett	111	29

	Original.	Print.
Order extending time to take testimony	150	39
Order of reference to auditor	151	40
Receipt for witness	153	40
Subpœna duces tecum	153	41
Marshal's return	154	41
Petition of A. G. Walker to be made party	154	41
Auditor's report	156	42
Depositions before auditor	180	48
Exhibit D—appointment of executor	215	57
E—certificate of probate	217	58
F—certificate of clerk	219	59
Exceptions to auditor's report	221	59
Order for reargument	225	60
Decree dismissing bill	226	60
Appeal to general term	226	61
Decree in general term	227	61
Appeal to the Supreme Court of the United States	228	61

1 *Original bill.—Filed Feb.* 1, 1871.

In the supreme court of the District of Columbia, the 1st day of Feb'y, A. D. 1871.

GODDEN AND APPERSON ET AL., PLAINTIFFS,
vs.
MARY A. S. KIMMELL ET AL., DEFENDANTS. } No. 2267. Eq. doc. 10.

To the supreme court of the District of Columbia, holding an equity court for said district:

The plaintiffs in this bill, to wit, Wellington Godden and James L. Apperson, late partners under the firm-name of Godden & Apperson; Robert Edmund, Isaac Davenport, j'r, and James H. Blair, late partners under the firm-name of Edmund, Davenport & Co.; William M. Sutton and E. T. Winston, late partners under the firm-name of E. T. Winston & Co.; William B. Isaacs and William F. Taylor, late partners under the firm-name of Isaacs & Taylor; F. H. Deane, jr.,
2 administrator of F. H. Deane, deceased; Peter J. Crew, administrator of Cornelius Crew, deceased; John A. Hutcheson, administrator of A. B. Hutcheson, deceased; James Gardiner, executor of Alexander Hill, deceased; Philip P. Winston, Hunton H. Marshall, and James C. Johnson, all of the city of Richmond, in the State of Virginia, as well in behalf of themselves as all other creditors of Edwin Walker, deceased, late of the city of Richmond, in the State of Virginia, secured in a deed of trust to one Voltaire Willett, deceased, late of the city of Washington, District of Columbia, which deed will be hereinafter mentioned, and who will contribute to the expense of these proceedings, complain as follows:

1. That in and before the year 1858 they were creditors of the said
3 Edwin Walker, deceased, who was then the owner of certain valuable real and personal property, comprising, among other things, lots sixteen (16), seventeen (17), eighteen (18), and nineteen (19), in square four hundred and ninety-one (491), situated on C street, between Four-and-a-half (4½) and Sixth streets, in the city of Washington, District of Columbia, and which the said Walker held in common with one Abram F. Kimmell, of said city of Washington, now deceased, with whom the said Walker was carrying on the livery-stable business under the firm-name of Walker and Kimmell, the said property being used for the purposes of said business.

2. That the said Walker, being indebted as aforesaid to the complainants, their testators and intestates, as well as to other parties, to
4 a great amount, dissolved partnership with said Kimmell, and conveyed all his real and personal estate, after payment of partnership debts, to one Voltaire Willett, above named, by a deed dated October 8, 1857, duly executed, acknowledged, and delivered, and recorded in liber J A S, No. 58, folio 248, et seq., one of the land records of the county of Washington, in the District of Columbia (an exemplified copy of which is herewith filed, marked "Exhibit A," and which is prayed to be taken as a part of this bill), in trust to pay off your complainants, their testators and intestates, with the proceeds thereof, and then to pay over the remainder to the said Edwin Walker, his heirs and assigns, all of which will more fully appear from said Exhibit A.

3. That at the period of the execution of said conveyance
5 the said Kimmell was in possession of the above-named property, and that he continued in possession thereof up to the day of his

death, holding the same and applying the proceeds thereof to his own use, without accounting for the rents and profits thereof to said Walker, Willett, or to said creditors, or any of them, and since the death of said Kimmell the said property has been in the possession of his widow and children, who have appropriated the same to their own use, and utterly deny all rights of your complainants to any part or interest in the same.

4. That said trustee, Voltaire Willett, is now dead, without having executed his said trust in whole or in part,; that he collected and received no part of the profits of said property, and made no con-
6 veyance thereof, except of said lots seventeen (17) and eighteen (18), in said square 491, which lots, by a deed dated November 16, 1858, and recorded in liber J A S, No. 173, folio 287, et seq., one of the land records of the county of Washingtou, District of Columbia, he, together with the said Kimmell, conveyed to one Kellellum H. Lambell, a brother-in-law of said Kimmell, as trustee for one Elizabeth Faulkes, a sister-in-law of said Kimmell, who was alleged to be a creditor of the said firm of Walker and Kimmell to the amount of two thousand dollars; that part of the consideration of the said last-mentioned conveyance was the payment of said debt, and the balance, amounting to three thousand dollars, was to be secured according to the wish of the said Kimmell.

5. And your complainants charge that said conveyance was
7 procured by said Kimmell fraudulently, in order to have the property reconveyed to himself, individually. That he never accounted to the said trustee, or to said Walker, or to any of his creditors, for the proceeds of said sale. That subsequently he did procure said lots to be reconveyed to himself, individually, by a deed dated February 19, 1864, and recorded in liber E C E, No. 37, folio 495, et seq., one of the land records of the county of Washington, District of Columbia, which said deed is from said Elizabeth Faulkes and Kellellum H. Lambell, and is for the consideration of five dollars. That said conveyance was not in pursuance of the powers given to said Willett as trustee. That he did not thereby collect the proceeds of the property for the payment of the secured creditors of said Walker, and that
8 said conveyances are void and of no effect as against your complainants, and the said property is justly subject and liable to the payment of their debts.

6. Your complainants further show that they are still unpaid creditors of said Edwin Walker, deceased; that neither they, their intestates nor testators have received any part of the debts secured in said deed to Willett; that they have been delayed in the prosecution of their rights by the deaths of said Walker, Willett and Kimmell; and that they are anxious to realize some portion of the debts from which they have been so long kept.

Forasmuch, therefore, as they are remediless in the premises, except through the intervention of a court of equity, where such matters
9 are properly cognizable, and to the end that justice may be done, may it please your honors to grant unto your complainants the most gracious writ of subpœna issuing out of your honorable court, directed to Mary A. S. Kimmell, administratrix of Abram F. Kimmell, deceased; to William L. Kimmell, A. Jackson Kimmell, Frank Kimmell, and to Mary Kimmell, children and heirs of said Abram F. Kimmell, deceased (the two last named children and heirs, Frank & Mary, being infants under age), all residents of the city of Washington, District of Columbia; to James P. Willett and Robert Willett, heirs and executors of Voltaire Willett, deceased, residents also of said city of Washington,

D. C.; and to Parris Walker, administrator and heir of Edwin Walker, deceased, a resident in the county of Prince George, State of
10 Maryland, commanding them full, true, direct, and perfect answer make, on their corporal oaths, to the several charges and allegations of this bill as if they were here repeated and each was interrogated with reference thereto.

And may it please your honors to decree:

1. That the above-mentioned heirs and administratrix of said Abram F. Kimmell, deceased, account with and pay over to your complainants the rents and profits which have accrued on said estate, conveyed as above, to said Voltaire Willett since the year 1858, together with all just interest thereon.

2. That the above-named conveyance from Willett and Kimmell
11 to said Kellellum H. Lambell, and from said Lambell to said Kimmell, deceased, be declared null and void.

3. That the said property conveyed in trust to said Willett, as aforesaid, be sold by a trustee appointed by this court, and the proceeds thereof, so far as the same will suffice, be applied by the order of this court to the payment of the debts of your complainants.

4. That for the purposes aforesaid all necessary accounts may be taken, inquiries made, and directions given.

5. That the plaintiffs may have such further and other relief as unto your honors may seem just and equitable.

And your complainants will ever pray, &c.

The defendants to this bill of complaint are: Mary A. S. Kim-
12 mell, William L. Kimmell, Andrew Jackson Kimmell, Frank Kimmell, Mary Kimmell, James P. Willett, Robert Willett, Parris Walker.

WALTER S. COX AND
F. M. McROBERTS,
Counsel for Plaintiffs.

13 *Exhibit A.—Filed Feb.* 1, 1871.

Edwin Walker to Voltaire Willett.—Deed of trust, recorded 22d July, 1858.

This indenture, made this 8th day of October, in the year 1857, between Edwin Walker, of the first part, and Voltaire Willett, of the second part, and certain creditors named in schedules B and C hereto annexed, as part of this deed, of the third part.

Whereas Edwin Walker and A. F. Kimmell have been engaged as partners, under the style of Walker and Kimmell, in the city of Washington, and in the progress of said partnership they have acquired certain real estate on C street, between 4½ and 6th streets, in said city, also certain personal property, including horses, carriages, buggies,
14 sulkeys, and other property, and hold claims against different persons; and whereas they are indebted to various persons in different amounts; and whereas Edwin Walker, independently of his indebtedness as a member of the firm of Walker and Kimmell, is indebted in a large amount to persons named in schedules B and C, and after paying all of the debts of the firm of Walker and Kimmell desires to convey his interest in the firm of Walker and Kimmell in trust to secure pro rata the debts in schedule B, and after paying off the debts in schedule B in full, if sufficient therefor, to secure the debts in schedule C pro rata, and if sufficient to pay off schedule C in full, to discharge them in full:

Now, therefore, this deed witnesseth, that said Edwin Walker,
15 in consideration of the premises and of the sum of one dollar to him in hand paid by said party of the second part before the sealing and delivery of these presents, the receipt whereof he doth hereby acknowledge, hath granted, bargained, sold, assigned, transferred, and conveyed, and by these presents doth grant, bargain, sell, assign, transfer, and convey unto said Voltaire Willett, his heirs, executors, administrators, and assigns forever, all of his, the said Edwin Walker's, right, title, and interest in and to the real and personal property, debts, effects, credits, and assets of every kind whatever, and in any manner belonging to the firm of Walker and Kimmell, but subject to the debts and liabilities due from said firm and to the rights of said Kim-
16 mell in winding up and paying off the same, the true intent and meaning of this deed being only to convey whatever interest said Walker may be entitled to after all of the liabilities of Walker and Kimmell have been paid off and discharged. To have and to hold the said interest of said Edwin Walker in said firm of Walker and Kimmell, but subject to the liabilities thereof, unto the said Voltaire Willett, his heirs, and assigns, and unto the only proper use and behoof of said Voltaire Willett, his heirs and assigns, and unto the only proper use and behoof of said Voltaire Willett, his heirs, executors, administrators, and assigns forever. But upon special trust that said Voltaire Willett will collect the interest of said Edwin Walker in said firm of Walker and Kimmell, and after paying the costs and charges attending this
17 trust will, in the first place, pay the debts in schedule B in full, if sufficient therefor, but if not sufficient therefor will pay the same pro rata, but if more than enough to pay the debts in schedule B in full will, in the second place, pay off the debts in schedule C in full, if sufficient therefor, but if not sufficient will pay the debts in schedule C pro rata, and if more than enough to pay the debts in both B and C, will pay any surplus to said Edwin Walker, his executors, administrators, or assigns.

In testimony whereof the parties hereto have set their hands and affixed their seals the day year first hereinbefore written.

EDWIN WALKER. [SEAL.]
VOLTAIRE WILLETT. [SEAL.]

18 STATE OF VIRGINIA,
City of Richmond, to wit:

We, C. B. Hill and George E. Sadler, justices of the peace for the city of Richmond, in the State of Virginia, do certify that Edwin Walker, a resident of said city, and a person to us well known, and a party to the deed hereto annexed, bearing date the 8th day of October, 1857, this day personally appeared before us in our said city and acknowledged the same to be his act and deed, and desired us to certify the said acknowledgement in order that said deed may be recorded in the proper court or office for the city of Washington in the District of Columbia.

Given under our hands and seals this 17th day of Octobor, 1857.

GEO. E. SADLER, *J. P.* [SEAL.]
C. B. HILL, *J. P.* [SEAL.]

19 STATE OF VIRGINIA,
City of Richmond, to wit:

I, Robert Howard, clerk of the court of hustings for said city, do hereby certify that C. B. Hill and Geo. E. Sadler, whose names are

signed to the above certificate, are now and were at the time of signing the same acting justices of the peace in and for said city, duly qualified, and that their said signatures are genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this 21st day of July, 1858.

[SEAL.] R. HOWARD, *Clk.*

SCHEDULE B.

20 *Lists of drafts, notes, and bonds due by Edwin Walker.*

Note or draft	Drawer.	Endorser.	When due.	Amount.
Draft	J. H. Allen on E. W.	J. H. Allen	18-21 Sept., 1857.	450 00
do	G. M. Bruce on E. W.	M. Thompson	25-28 " "	
Note	Edwin Walker.	B. W. G. E. Davenport	22 Dec. "	900 00
Draft	J. A. J. Lee on E. W.		21-24 Sept. "	3,189 07
Note	E. Walker	J. J. E. True	" "	850 00
do	do	M. Weiseger & Co	14-17 Oct., "	1,300 00
do	do	E. T. Winstone & Co	3-6 " "	662 50
Bond	E. Walker & B. W. Green	J. Bernard	10-13 " "	1,500 00
Draft	E. Walker.	B. W. Green., E. T. Winston Co	1st " "	800 00
Note	B. W. Green	E. W. Baldwin & Co	18-21 " "	1,500 00
Do.	E. Walker.	B. W. Green, J. T. Philips	24-27 " "	181 00
Do.	E. Walker	Dudley and Johnson	27-30 " "	450 00
Do.	do	J. D. Thomas, G. & Apperson	1-4 Dec., "	778 82
Do.	do	Smith & Harwood	3-6 " "	2,388 33
Do.	do	Alex'r Hill	10-13 " "	248 34
Do.	do	Mark Downey	5-8 " "	516 13
Do.	do	John A. Lacy	8-11 " "	264 46
Do.	B. W. Green	E. Davenport & Co	10-13 " "	608 39
Do.	E. Walker	J. H. Wickham, Va. C. R. R.	17-20 " "	610 34
Do	do	B. W. Green	2d " "	2,000 00
21 Draft	E. Walker on W. & K.	J. Steers & Co	1-4 " "	3,500 00
Note	E. Walker	B. Pilcher	5-8 Dec., 1857	4,310 59
Note	do	A. B. Hutcheson	12-15 " "	300 00
Note	B. W. Green	E. Walker, B. D. Philips	13-16 " "	450 00
Note	E. Walker	J. H. Wickham, E. D. & Co	19-22 " "	283 00
Note	B. W. Green	Goddin & Apperson	14-17 Jan., 1858	4,000 00
Note	E. Walker	J. D. Thomas, S. J. Sullivan	6-9 " "	237 54
Note	E. Walker	J H. Wickham, Va. C. R. R	25-28 " "	1,200 00
Note	E. Walker	R. Blankinship	2d " "	4,000 00
Note	B. W. Green	E. Walker, Ja's Philips	21-24 " "	642 27
Note	do	do do	10-13 " "	2,000 00
Note	E. Walker	B. W. Green, Davis & H	10-13 " "	214 20
Note	B. W. Green	J. F. White	23-26 " "	588 50
Note	B. W. Green	E. Walker	14-17 " "	175 00
Note	E. Walker	Cornelius Crew	15-18 " "	600 00
			7-10 " "	1,000 00
				74,843 50
Note	E. Walker	B. W., G. E. Davenport & Co	18-21 " "	2,084 00
Draft	S. C. Piper on E. W		5-8 " "	600 00
Do.	W. Wheat on E. W.		29-1 " "	520 00
Note	E. Walker		13-16 " "	125 00
Draft	J. A. J. Lee on E. Walker	B W. Green	21-24 " "	850 00
Note	E. Walker	B. W. Green, Burruss	22-25 " "	325 00
22 Draft	E. Walker	B. W G., Peters, Spence & Co	11-14 Oct., 1857	5,588 84
Draft	J. H. Allen on E. W	J. H. Allen	18-21 Nov., "	2,770 00
Note	J. Steer & Co	Dudley and Johnson	12-15 " "	612 50
Do.	E. Walker	J. D. Thomas, E. J. Winston & Co	1-4 " "	1,560 00
Do.	B. W. Green	E. Davenport & Co	3-6 " "	1,064 43
Do.	E. Walker	J. D. Thomas, P. P. Winston.	13-16 " "	1,750 00
Do.	E. Walker	M. Weiseger & Co	16-19 " "	397 38
Do.	E. Walker	J. D. Thomas, Frye & Sons	17-20 " "	1,500 00
Do.	E. Walker	J. D. Thomas, A. L. Deevoit	18-21 " "	1,500 00
Draft	E. Walker, E. W.	V. C. Foster	20-23 " "	325 00
Note	E. Walker	B. W. Green, Jno. Enders	18-21 " "	1,500 00
Note	E. Walker	B. W. Green, E. N. Dabney	1-4 " "	229 50
Note	E. Walker.	R. M. Nemmo	21-24 " "	205 53
Draft	B. Pelcher on B. W. G	Benford and Foster.	29-1 " "	90 00
Note	E. Walker	J. D. Thomas, Va. C. R. R. Co	2d " "	1,500 00
Note	E. Walker.	Godden and Apperson	8-11 " "	2,235 74
Note	E. Walker.	B. W. G., J. C. Johnson	9-12 " "	1,374 57
		Carried forward		37,286 71
Draft	R. Bridgwater on B. W. G.	Bro't forward		37,286 71
		W F. Hird	6-9 Nov., 1857	172 75

SCHEDULE B—Continued.

Note of draft	Drawer.	Endorser.	When due.	Amount.
Note	B. W. Green	E. Davenport & Co	25-28 " "	369 60
Draft	E. Walker, accept	Clark and Carbin	1-4 " "	1,410 00
Do	do do	Clark and Carbin	" "	2,558 00
23				
Note	E. Walker	B. W. Green & F. H. Deane	3 Dec, "	300 00
Do	do	do J. E. Deason	3 Dec., "	170 00
Note	E. Walker	J. D. Thomas, W. Allen	5-8 Dec., "	1,500 00
Note	E. Walker	N. Tate	30-3 " "	160 53
Draft	E. Walker on W. & K	E. D. & Co	22-25 Jan., 1858	2,000 00
Note	E. Walker	J. H. Wickham & Jos. Allen	5-8 Feb., 1858	2,000 00
Draft	B. W. G. on E. Walker	Clark & Carbin	1 Mar., "	2,657 00
Note	E. Walker	J. D. Thomas, E. T. W. & Co	8-11 " "	2,050 00
Note	do	B. S. Dandridge	16-19 " "	925 00
Draft	E. Walker on W. & K	J. Steers & Co	4-7 Sept., 1857	2,000 09
Do	do do	do	5-8 " "	5,000 00
Note	B. W. Green	W. W. Parker	24-27 Oct., "	175 00
Note	do	A. B. Hutcherson	6-9 Dec., "	625 00
Note	do	V. Willett	9-12 " "	800 00
Note	E. Walker	B. W. G., D. Phillips	12-15 Feb'r, 1858	250 00
Note	E. Walker	C. Gennett	14-17 " 1858	330 00
Note	E. Walker	Jno. A. Lacy	14-17 " "	480 15
Note	E. Walker	B. W. G., B. S. Dandridge	22-25 Mar., "	425 00
Note	B. W. Green	G. & Apperson	12-15 July, "	244 46
Note	E. Walker	E. Davenport	25-28 " "	5,000 00
Draft	J. Steers on W. & K	J. Steers & Co	28-31 Jan'y, 1858	2,400 07
Note	Edmund Wenston			4,000 00
	Debt to W. B. Rogers evidenced by D'r'fs acceptances of E. Walker		Oct., '57 & Jan.'58	14,172 85
24	Debt to James McMiller, evidenced by E. Walker's acceptance		Dec., 1857.	9,500 00
	Debt to Alexander S. Miller, by E. Walker's note		Jan'y, 1858	7,200 00
	Debt to B. F. Rogers, by E. Walker's acceptance		Nov. & Dec., 1857	5,920 43
	Debt to B. H. Lindsley, by E. Walker's acceptance		Dec., 1857.	4,008 94
	Debt to J. S. Harton, by E. Walker's acceptance		Oct., 1857	2,463 21
	Debt to C. C. Rogers, E. Walker's acceptance		Oct. 1857 & Jan 58	3,412 50
	Debt to W. S. Rogers, by E. Walker's acceptance		" " "	1,337 50
	Debt to Ja's D. Waw, by E. Walker's bond		14 Nov., 1857	2,000 09
	Debt to Will Way, by E. Walker's acceptance		21 Oct., "	1,647 76
	Debt to J. E. Stropshin, by E. Walker's acceptance			1,548 90
	Debt to Geo. M. McClelland, by E. Walker's several acceptances			12,220 00
	Debt to Edmund Davenport & Co., by due-bill for borrowed money			500 00
	To Edmund Davenport & Co., by bank-check			2,500 00
25	Debt to Isaacs & Taylor, by bank-check			1,000 00
	" " do	do		2,000 00
	" " Godden & Apperson, reserved do			6,000 00

EDWIN WALKER.

SCHEDULE C.

List of debts due by Edwin Walker.

H. E. Shaw, on debt due by acceptance of E. Walker, due 14 Dec., 1857, for $1,697 85
Do. debts by acceptance of E. Walker, for 2,000 00
G. M. Parker, debt due by acceptance of E. Walker, due 5 Sept., 1857, for 3,812 64
W. M. Shaw, debt due by two acceptances of E. Walker, due May & July, for 5,570 00
W. M. Shaw, due-bill of E. Walker, for 1,682 00

And other debts which may have been omitted in Schedule B, and in this schedule, and due by Edwin Walker.

EDWIN WALKER.

26 *Subpœna.*

In the supreme court of the District of Columbia, February 1st, 1871.

WELLINGTON GODDEN ET AL., COMPLAINANT', *vs.* MARY A. S. KIMMELL ET AL., DEFENDANT'. } No. 2267. Equity dock 10.

The President of the United States to Mary A. S. Kimmell, William L. Kimmell, A. Jackson Kimmell, Frank Kimmell, & Mary Kimmell, James P. Willett, Robert Willett, and Parris Walker, defendants:

You are hereby commanded to appear in this court, at its first special term occurring twenty days after service of this subpœna, and answer the exigency of the bill under pain of attachment, and such other process of contempt as the court shall award.

Witness, D. K. Cartter, chief justice.

[SEAL.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

MEMORANDUM.—That the defendants are to enter their appearance in this suit in the clerk's office on or before the special term to which this writ is returnable, otherwise the bill may be taken for confessed.

27 I do authorize & depute J. Edwards to serve this writ.

A. SHARP,
Marshal.

Feb'y 1st, '71.

Marshal's return.

Not to be found, Jackson Kimmell, Parris Walker. Sum'd all the others by leaving copy at M'r's Mary A. S. Kimmell, mother of W. L., Frank, Mary Kimmell, at their place of residence, & on J. P. & Rob. Willett in person.

A. SHARP,
Marshal.

Feb'y 1st, '71.

Sum'd A. Jackson Kimmell.

A. SHARP,
Marshal.

March 14th, '71.

28 *Answer to bill.—Filed Ap'l 4, 1871.*

In the supreme court of the District of Columbia, the 4th day of April, A. D. 1871.

GODDIN AND APPERSON ET AL., PLAINTIFFS, *vs.* MARY A. S. KIMMELL ET AL., DEF'TS. } No. 2267. Eq. doc. 10.

Joint answer of Mary A. S. Kimmell, administratrix of Abram F. Kimmell, deceased, William L. Kimmell and Andrew J. Kimmell, to the bill of complaint of Wellington Goddin and James L. Apperson, late

partners under the firm name of Goddin & Apperson; Robert Edmund, Isaac Davenport, j'r, and Ja's H. Blair, late partners under the firm name of Edmund, Davenport & Co.; William M. Sutton and E. T. Winston, late partners under the firm name of E. J. Winston & Co.; William B. Isaacs and William Garland, late partners
29 under the firm name of Isaacs and Taylor; F. H. Deane, j'r, administrator of F. H. Deane, deceased; Peter I. Crew, administrator of Cornelius Crew, deceased; John A. Hutcheson, administrator of A. B. Hutcheson, deceased; James Gardiner, executor of Alexander Hill, deceased; Philip P. Winston, Hunton H. Marshall and James C. Johnston.

1. These defendants admit that Mary A. S. Kimmell is the administratrix of Abram F. Kimmell, deceased, and that William L. Kimmell and Andrew J. Kimmell are two of the children and heirs at law of the said A. F. Kimmell, deceased. That Mary E. S. Kimmell and Frank Kimmell are also children and heirs at law of the said A. F. Kimmell deceased, but are infants under the age of twenty-one years.

2. These defendants are not informed and cannot admit that the
30 complainants, or any of them, were at or before the year 1858 creditors of Edwin Walker, deceased, and having no knowledge or belief on the subject, require of the complainants full proof thereof, if the fact be material in this suit.

3. These defendants deny that the said Edwin Walker was at any time the owner of the real estate described in the said bill. They say of the real estate so mentioned lot No. sixteen (16), a small portion of the rear of lot No. (17) seventeen, and the west half of lot eighteen (18) was the property of the firm composed of the said A. F. Kimmell and E. Walker, and was held, owned and used as partnership property until the dissolution of the said partnership, and then became the sole property of the said A. F. Kimmell, though the legal titles stood in the names of said A. F. Kimmell and E. Walker as tenants in common.

31 4. That the front part of lot No. seventeen (17) and the east half of lot No. eighteen (18) never belonged either to the said E. Walker or to the said firm, but were the individual property of the said A. F. Kimmell.

5. That lot No. nineteen (19) never was the property of either said A. F. Kimmell, E. Walker, or the said firm, but belonged and still belongs to strangers to this suit.

6. These defendants admit that the partnership between the said Edwin Walker and A. F. Kimmell was dissolved prior to the 8th of October, 1857, and that on that day said E. Walker made the deed of conveyance set forth in the bill of complaint.

7. These defendants admit that at the date of the said deed the said A. F. Kimmell was in the possession of all of the real estate herein-
32 before mentioned, except lot No. nineteen (19), and that since that time he and his heirs have continued in possession, claiming the same and appropriating the proceeds to their own use.

8. These defendants deny that the said, E. Walker, at or since the date of the said deed, owned, possessed, or was entitled to any personal property, whether in the hands of said A. F. Kimmell, or that the said A. F. Kimmell had in his possession any personal property belonging to said E. Walker, or to the said late firm.

9. They admit the death of the said Voltaire Willett, but are not informed and cannot state whether he did anything in discharge of the trusts created by the said deed except as hereinafter stated.

10. They admit that the said Willett and the said A. F. Kim-
33 mell made the deed of conveyance to Kellellunin H. Lambell, set forth in the bill of complaint, and they say that they are informed and believe it to be true that the said deed was made in good faith and in satisfaction of a certain debt contracted several years before and then due to the said Elizabeth A. Foulkes, for money advanced for the individual use of the said Edwin Walker on the 18th of November, 1853, and for which the said firm had given their notes bearing interest; that the said debt and interest then amounted to upwards of twenty-six hundred dollars ($2,600), and the property so conveyed to the said E. A. Foulkes was worth not more than about five thousand dollars ($5,000), and the interest of said E. Walker therein was worth not more than about twenty-five hundred dollars (2,500), and his said interest
34 was received and accepted by the said E. A. Foulkes in discharge of the said debt; that under and by virtue of the said deed of conveyance from said E. Walker to said V. Willett, the legal title to an undivided portion of the said property was vested in the said Voltaire Willett, subject to the debts of the said firm, and expressly made subject to the rights of the said A. F. Kimmell to wind up and pay off the said debts; and that the act of the said Willett in joining in said conveyance in order to pay a debt of this said firm, now in accordance with and pursuant to the trusts declared in the said deed of the said E. Walker of Oct. 8th, 1857; and they deny all fraud or bad faith in the premises. These defendants say that the said A. F. Kimmell did ac-
35 count to the said Willett for the proceeds of the said sale of this said property, so far as such account was necessary, by showing to and satisfying him that the debt due to said E. A. Foulkes was due and unpaid, and was contracted solely for said Walker's benefit, whereupon the said Willett believed it just and honest to join in a deed to satisfy the same to the said E. A. Foulkes.

12. These defendants are informed and believe, and upon such information and belief deny that the plaintiffs are unpaid creditors of the said E. Walker, but charge the fact to be that they have been paid in full; and they say, upon information and belief, that some year, prior to the year 1857, to wit, in the year 1846, the said E. Walker left Washington and went to Richmond, Virginia, where he engaged in business
36 with one Benj. W. Green, and there incurred large debts, for which the said B. W. Green was jointly liable, including those debts mentioned in the schedule to the deed of Oct. 8th, 1857, the payment of which the complainants in this cause seek to enforce; that in the latter part of the year 1857 the said E. Walker, at Richmond, made a deed conveying to the said Green a large amount of real and personal property for the satisfaction of said debts, and the said Green accepted the same and assumed and undertook to pay all the said debts, including those now set up in this bill of complaint, and to indemnify and save harmless the said E. Walker against the same; and that afterwards the said Green, or said E. Walker, or both, did satisfy and extinguish all the said debts, either by payment in money or by giving other
37 securities which were accepted in full satisfaction of said debts.

These defendants admit the deaths of said E. Walker, A. F. Kimmell, and V. Willett, but they deny that their deaths have or could have produced any delay in the prosecution of the said claims, for all of them have died in and since the year 1868. On the contrary these defendants believe and charge that not the deaths of these persons but their lives delayed the prosecution of the said claims, for no attempt was made in the lifetime of either of them to set up the rights now sought

to be enforced, and it is only since the death of all of them that the said complainants have brought forward the pretensions set forth in the bill of complaint, and they verily believe that had the said parties been
38 living this suit would not have been commenced. These defendants are informed and believe that the said suit has been instituted unadvisedly by those who have authorized it, and some of the parties whose names are included among the complainants, to wit, Wellington Goddin and Ja's L. Apperson, have not authorized any suit to be brought.

They further show that Hunton H. Marshall, who is named as one of the complainants, is not named in the said deed of the said Walker of Oct. 8th, 1857, and shows no right under it; and they demur to so much of the bill as seeks relief for him. And, upon information and belief, these defendants further show that, as hereinbefore stated, the said Walker in the year 1846 went to Richmond, Virginia, and there engaged in business on his own account; that at the time of leaving he
39 relinquished all interest in the future earnings of the business, and the partnership was as between the parties thereto dissolved, though, unfortunately for the said A. F. Kimmell as it afterwards turned out, no formal notice of the dissolution of the partnership was publicly advertised. That at the time of the said dissolution there was, besides the said real estate, a large stock of horses, vehicles, and other property on hand, all of which was taken by the said A. F. Kimmell; that from time to time the said Kimmell made payments and advances to the said Walker until the gross amount thereof exceeded the amount of said Walker's interest as estimated by himself, but the said Walker being then engaged in large transactions on his own account and with said B.
40 W. Green, which were supposed to be profitable, and being believed to be perfectly solvent, the said A. F. Kimmell having confidence in him and his business capacity, advanced the said moneys without closely observing the state of accounts between them or coming to any final settlement.

And these defendants charge that, upon a settlement of accounts, the said Walker would be found to be largely indebted to the estate of the said Kimmell after crediting him with the value of his interest in the real estate hereinbefore mentioned; but they say that any such a settlement at this time would be difficult, expensive, and unsatisfactory, in consequence of the long lapse of time and the death of both parties to the transactions; that the said Walker, although as hereinbefore stated the debts for which he had mortgaged his interest had been
41 paid and satisfied, never in the life-time of said A. F. Kimmell made any claims upon him for any balance due, nor did the complainants ever advance any claims to his right.

That the said claims are stale demands of a character not countenanced in courts of equity, and it would be inequitable and unjust if they should now be permitted to enforce an account from these defendants after having slept upon their rights—if any they have—for so long a time, and until all the parties to the transactions are dead.

And, having fully answered, these defendants beg to be hence dismissed with their reasonable costs in this case sustained.

M. A. S. KIMMELL,
Adm'tr'x, &c.
W'M L. KIMMELL.
A. J. KIMMELL.

J. D. McPHERSON,
Solicitor for Def'ts.

42 They, the above-mentioned M. A. S. Kimmell and W. L. Kimmell, do solemnly swear that they have read and heard read the answer by them subscribed and know the contents thereof; and that the facts therein stated upon their personal knowledge are true, and that the facts therein stated upon information and belief they believe to be true.

April 4th, 1871.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

43 *Answer of Ja's P. and Rob't Willett.—Filed Apr.* 4, 1871.

In the supreme court of the District of Columbia, the 4th day of April, 1871.

GODDIN AND APPERSON ET AL., PLAINTIFFS,
vs.
M. A. S. KIMMELL ET AL., DEFENDANTS.
} No. 2267. Eq. doc. 10.

Joint answer of James P. Willett and Robert Willett, heirs at law and executors of Voltaire Willett, deceased, to the bill of complaint of Wellington Goddin and James L. Apperson and others, &c., &c.

1. These defendants admit that they are heirs at law and the executors of the said Voltaire Willett, deceased, but they say that they have no knowledge or belief in regard to the allegations in the said bill of complaint and cannot answer more fully thereto.

And they further say they shall hold themselves subject to the
44 decrees of the honorable court in this cause.

JAMES P. WILLETT AND
ROBERT WILLETT,
Executors of Voltaire Willett.

JNO. D. MCPHERSON,
Solicitor for D'f'd'ts, &c.

Replication.—Filed Ap'l 15, 1871.

In the supreme court of the District of Columbia.

GODDIN & APPERSON ET AL., COMPLAINANTS,
vs.
M. A. S. KIMMELL ET AL., DEFENDANTS.
} No. 2267. Eq. doc. 10.

The complainants hereby join issue with the defendants and will hear the cause on the pleadings and proofs.

WALTER S. COX,
THO'S M. MCROBERTS,
Solicitors for Complainants.

45 *Order of publication.—Filed Ap'l* 18, 1871.

In the supreme court of the District of Columbia, the 18th day of April, 1871.

GODDIN & APPERSON ET AL.
vs.
MARY A. S. KIMMELL ET AL.
} No. 2267.

On motion of the complainants, by Mess. Cox, McRoberts, & Hanna,

S. Kimmell, the mother of said infant defendants, be, and she is hereby, appointed guardian ad litem to said infant defendants, to answer the bill of complaint in this cause, and that said guardian do forthwith file an answer for said infants to said bill, under her corporal oath.

By the court.

52 *Ans. of infants by guardian.—Filed July* 22, 1871.

In the supreme court of the District of Columbia the day of July, A. D. 1871.

GODDIN AND APPERSON ET AL., PL'T'FFS, *vs.* MARY A. S. KIMMELL ET AL., DEF'TS. } No. 2267. Eq. doc. 10.

The joint answer of the infants Frank and Mary E. S. Kimmell, by their guardian, to the bill of complaint of Wellington Goddin and James L. Apperson, late partners under the firm-name of Goddin and Apperson; Robert Edmund, Isaac Davenport, j'r, and Jas. H. Blair, late partners under the firm-name of Edmund, Davenport & Co.; William M. Sutton and E. T. Winston, late partners under the firm-name of E. T. Winston & Co., and others, complainants, in this cause exhibited.

These defendants, being infants of tender years, cannot admit
53 any of the matters and things alleged in the said bill of complaint, but submit their rights to the protection of this court.

MARY A. S. KIMMELL,
Guardian ad Litem.

Sworn and subscribed before me July 22, 1871.

R. J. MEIGS, *Clerk.*

Replication to ans. of infants.—Filed July 31, 1871.

Supreme court of the District of Columbia.

GODDEN & APPERSON ET AL. *vs.* KIMMELL ET AL. } No. 2267. Eq. doc. 10.

The complainants hereby join issue with the defendants, Parris Walker and Frank & Mary E. Kimmell.

COX, MACROBERTS & HANNA,
Sol'rs for Compl'tts.

54 *Order extending time for taking testimony.—Filed Aug.* 5, 1871.

In the supreme court of the District of Columbia.

GODDIN & APPERSON ET AL. *vs.* KIMMELL ET AL. } No. 2267. Eq. doc. 10.

It is this 5th day of August, 1871, ordered that the time for taking testimony in the above-entitled cause be enlarged to the fifteenth day of November next.

ANDREW WYLIE,
Justice, &c.

Order further extending time for taking testimony.—Filed Nov. 17, 1871.

In the supreme court of the District of Columbia.

GODDIN & APPERSON ET AL. *vs.* KIMMELL ET AL. } No. 2267. Eq. doc. 10.

Ordered this 17th day of November, 1871, by consent, that the
55 time for taking testimony in this cause be enlarged to the 15th day of December, 1871.

By the court.

A. WYLIE.

We consent to the above.

RICHARD L. WALLACH,
Sol'r for Parris Walker, Def't.
W. S. COX, *for Compl'ts.*
J. D. McPHERSON, *for Def'ts.*

Agreement that comm'n may issue.—Filed Nov. 29, 1871.

In the supreme court of the District of Columbia the twenty-ninth day of November, A. D. 1871.

GODDIN & APPERSON ET AL. *vs.* M. A. S. KIMMELL ET AL. } No. 2267. Eq. doc. 10.

We hereby consent to the issuing of a commission to take testimony to Robert D. Wood and Edgar M. Garnett, at Richmond, Virginia, to take the testimony of each of the following-named witnesses or
56 any of them, or others who may be produced, upon the interrogatories and exhibits filed herewith to be used in this cause, hereby expressly waiving all objection to the manner and form of the issuing of this commission, and agree that the depositions taken thereunder may be admitted as part of the evidence in said cause, subject to any legal objection made to any of said interrogatories. And the counsel for the defendants, respectively, hereby waive their right to file cross-interrogatories.

W. S. COX,
JNO. F. HANNA,
Counsel for Compl'ts.
RICHARD L. WALLACH,
Counsel for Def'ts.
JNO. D. McPHERSON,
Sol'r for Kimmells.

57 The following named are the witnesses above referred to: Wellington Godden, James L. Apperson, Robert Edmund, Isaac Davenport, j'r, J. H. Blair, William M. Sutton, E. T. Winston, William B. Isaacs, William Garland, F. H. Deane, j'r, Peter J. Crew, John A. Hutcheson, James Gardner, Philip P. Winston, Hunton H. Marshall, James C. Johnson, and to others who may be produced before the commissioners.

58 *Order extending time for taking testimony.—Filed Jan.* 20, 1872.

In the supreme court of the District of Columbia, January 20th, 1872.

GODDEN & APPERSON ET AL.
vs.
KIMMELL ET AL. } No. 2267. Eq. doc. 10.

Ordered, by consent of counsel for plaintiffs and defendants, that the time for taking testimony in the above-entitled cause be enlarged to the first day of March, A. D. 1872.

A. WYLIE.

We consent to the above order being passed.

W. S. COX,
JNO. F. HANNA,
For Pl'ffs.
JNO. D. McPHERSON,
RICHARD L. WALLACH,
For Def'd'ts.

59 *Order to take testimony.—Filed Mar.* 4, 1872.

In the supreme court of the District of Columbia, March the fourth, A. D. 1872.

GODDEN, APPERSON ET AL.
vs.
KIMMELL ET AL. } 2267. Eq. doc. 10.

By consent of counsel it is this day ordered that this cause be referred to John Cruikshank, examiner, to take testimony, and that the time for taking testimony be enlarged to the first day of May, A. D. 1872.

By the court.

A. WYLIE.

We consent.

JNO. D. McPHERSON,
For Def'd'ts.
W. S. COX,
For Compl'ts.
RICHARD L. WALLACH,
For Def'd't Walker.

60 *Testimony for complainants—6 exhibits.*

In the supreme court of the District of Columbia, May 16, 1872.

GODDEN & APPERSON ET AL.
vs.
KIMMELL ET AL. } No. 2267. Eq. doc. 10.

J. F. Hanna, esq., for plaintiffs, puts in evidence papers marked Exhibits, pl'ff, 1, 2, 3, 4, 5, and 6.

Examination adjourned until further notice.

JNO. CRUIKSHANK,
Examiner in Chancery.

I certify that at an examination held before me in this cause on the 16th day of May, 1872, the above testimony was filed for plaintiffs.

JNO. CRUIKSHANK,
Examiner in Chancery.

MARCH 31, 1873.

61 *Exhibit, p'ff's, 1.*

John & Provey Gadsby to Walker & Kimmell. Recorded 29th August, 1842.

This indenture made this seventeenth day of August, eighteen hundred and forty-two, between John Gadsby and Provey Gadsby, his wife, of the one part, and Edwin Walker and Abraham F. Kimmell, known as the firm of Walker and Kimmell, of the other part, all of the city of Washington, in the District of Columbia, witnesseth:

That the said John Gadsby and his wife for and in consideration of the sum of five thousand dollars current money of the United States in hand paid them by the said Edwin Walker and Abraham F. Kimmell before the delivery of these presents, the receipt whereof is hereby
62 acknowledged, have given, granted, bargained and sold, aliened, released, surrendered, and confirmed, and by these presents do give, grant, bargain and sell, alien, release, surrender, and confirm unto the said Edwin Walker and Abraham F. Kimmell, their heirs and assigns forever, the following parcels of ground in square number four hundred and ninety-one in the city of Washington, namely, all of lot number sixteen, and the south part of lot number seventeen, contained within the following metes and bounds, that is to say: Beginning at a point on the line of C street north two hundred and seventy-four feet one inch and a half from the northeast corner of said square and running thence east with the line of C street north forty-seven feet eight inches, and thence due south one hundred and four feet eleven inches, thence southeastwardly forty-three feet six inches along the line
63 of an alley, the right to and use of which is hereby secured in perpetuity for benefit of said lots number sixteen and seventeen; thence due south twenty-nine feet eight inches along the west line of the same alley to a public alley thirty feet wide; thence northwestwardly ninety-one feet six inches along the line of said alley thirty feet wide to another public alley, said to be fifteen feet wide; thence due north one hundred and twenty-seven feet one inch along the line of the last-mentioned alley to the point of beginning, together with the buildings, improvements, rights, privileges, appurtenance, and other hereditaments to the same belonging or in any manner appertaining, and the remainders, reversions, rents, issues, and profits thereof, and all the right, title, interest, and estate of them, the said John Gadsby
64 and wife, to the same and every part thereof, to have and to hold the said lot number sixteen and south part of lot number seventeen in square number four hundred and ninety-one in the city of Washington, as hereinbefore described, unto them, the said Edwin Walker and Abraham F. Kimmell, their heirs and assigns, forever to their and their heirs, sole use, benefit, and behoof forever. And the said John Gadsby, for himself, his heirs, executors, and administrators, by these presents covenants, promises, and agrees to and with the said Edwin Walker and Abraham F. Kimmell, their heirs and assigns, that he, the said John Gadsby, hath a good and perfect title to all the said lands and premises, and that the same are clear of all incumbrances, and that he,

the said John Gadsby, and his heirs shall and will warrant and
65 forever defend the said and each of the said parcels of land and premises, with the appurtenances hereby bargained and sold, unto them, the said Edwin Walker and Abraham F. Kimmell, their heirs and assigns, from and against him, the said John Gadsby, his heirs and assigns, and all persons claiming or who may claim by, through, or under him or them or any of them, and from and against all manner of persons and claims whatsoever.

And further, that he, the said John Gadsby, and his heirs and executors shall and will at any and all times hereafter, at the request and costs of the said Edwin Walker and Abraham F. Kimmell, their heirs and assigns, make, acknowledge, and deliver any and every other deed or assurance in law for the more sure and effectual conveyance of
66 the said and each of the said parcels of land and premises, with the appurtenances, to the said Edwin Walker and Abraham F. Kimmell, their heirs and assigns, as their counsel may require.

In testimony whereof the said John Gadsby and Provey Gadsby, his wife, have hereunto set their hands and seals the day and year first herein written.

JOHN GADSBY. [SEAL.]
PROVEY GADSBY. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN H. MCBLAIR.
SAMUEL DRURY.

DISTRICT OF COLUMBIA,
County of Washington, to wit:

I, William Waters and Samuel Drury, justices of the peace in and for the county aforesaid, in the District of Columbia, do hereby
67 certify that John Gadsby, a party to a certain deed bearing date on the seventeenth day of August, eighteen hundred and forty-two, and hereto annexed, personally appeared before us, in our county aforesaid, the said John Gadsby being personally well known to us as the person who executed the said deed, and acknowledged the same to be his act and deed.

And we, William Waters and Samuel Drury, justices of the peace in the county and District aforesaid, do also certify that M'r's Provey Gadsby, the wife of the said John Gadsby, party to a certain deed bearing date on the seventeenth day of August, eighteen hundred and forty-two, and hereunto annexed, personally appeared before us, in our county aforesaid, this day, the said M'r's Provey Gadsby being personally well known to us as the person who executed the said deed,
68 and she being by us examined privately and apart from her husband, and having the deed aforesaid fully explained to her, she, the said M'r's Provey Gadsby, acknowledges the same to be her act and deed, and declares that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under our hands and seals this twenty-sixth day of August, eighteen hundred and forty-two.

[SEAL.] WILLIAM WATERS, *J. P.*
[SEAL.] SAMUEL DRURY, *J. P.*

(On the back of the above:)
This is to certify that the within is a true and certified copy of a deed

as recorded in Liber W. B., No. 96, fol. 236, one of the land records of this office.

Washington, D. C., Oct. 16, '71.

[SEAL.]

S. WOLF,
Recorder.
GEO. F. SCHAYER, *Dep.*

69 *Exhibit, Pl'ff, 2.*

H. M. Morfit, trustee, &c., to Walker and Kimmell. Deed, recorded 18 Nov'r, 1844. Liber W. B., No. 112, fol. 258.

This indenture, made this seventh day of November, eighteen hundred and forty-four, between Henry M. Morfit, as trustee, of the one part, and Edwin Walker and Abraham F. Kimmell of the other part, all of Washington City.

Whereas by *a* virtue of a deed of trust from William Gadsby to said Henry M. Morfit, dated the 14th day of November, 1842, and recorded in the land records of Washington County, in Liber W. B., No. 98, folio 127 to 130, to secure the payment of the debt therein named, the said Morfit exposed at public auction, on the 5th day of November, 1844, on the premises, after due notice thereof, the west half of lot num-
70 bered eighteen, in square numbered four hundred and ninety-one, in Washington City, at which time the said Edwin Walker and Abraham F. Kimmell became the highest bidders for and purchasers thereof, at the price of seven hundred and sixty-nine dollars and seventy cents, and they having paid the said purchase money:

Therefore, this indenture witnesseth, that for and in consideration of the premises, and also the sum of one dollar current money in hand paid the said Morfit, as trustee, by the said Edwin Walker and Abraham F. Kimmell, before the delivery of these presents, the receipt whereof is hereby acknowledged, he, the said Henry M. Morfit, as trustee aforesaid, hath given, granted, bargained, sold, aliened, released, surrendered, and conveyed, and by these presents doth give, grant,
71 bargain, sell, alien, release, surrender, and convey unto the said Edwin Walker and Abraham F. Kimmell, as tenants in common, and not as joint tenants, their respective heirs and assigns, forever, all the right, title, interest, and estate of him, the said Henry M. Morfit, as trustee aforesaid, in and to the said west half of lot numbered eighteen, in square four hundred and ninety-one, in Washington City, containing or supposed to contain three thousand five hundred and eighty square feet, being all that part of lot eighteen, in square four hundred and ninety one, in Washington City, which is as follows: Beginning for the same on north C street, at a point twenty-five feet from the dividing line between lots eighteen and nineteen in said square, and running thence west along the line of C street north twenty-five feet, to
72 the dividing line between lots seventeen and eighteen in that square; thence at a right angle with C street north, and along the dividing line between lots seventeen and eighteen, south one hundred and forty-one feet five inches to the alley in the rear; thence eastwardly along the line of that alley twenty-five feet three inches; thence on a line parallel to the dividing line between lots seventeen and eighteen from the line of said alley in the rear, north up to north C street at the point of beginning, together with the improvements, rights, privileges, appurtenances, and other hereditaments unto the same belonging, or in any manner appertaining, and the remainders,

reversions, rents, issues, and profits thereof, and all the right, title, interest, and estate of him, the said Henry M. Morfit, as trustee,
73 in and to the same. To have and to hold the said west half of lot of ground numbered eighteen, in square four hundred and ninety-one, in Washington City, and premises, with the appurtenance, unto them, the said Edwin Walker and Abraham F. Kimmell, as tenants in common, and not as joint tenants, their respective heirs and assigns, forever.

In testimony whereof the said Henry M. Morfit, as trustee aforesaid, hath hereunto *hereunto* set his hand and seal the day and year first in this indenture written.

HENRY M. MORFIT, [SEAL.]
Trustee.

Signed, sealed, & delivered in the presence of—
B. K. MORSELL.
CLEM'T T. COOTE.

DISTRICT OF COLUMBIA,
County of Washington, to wit:

74 We, Benjamin K. Morsell and Clement T. Coote, justice' of the peace in and for the county aforesaid, in the District of Columbia, do hereby certify that Henry M. Morfit, trustee, a party to a certain deed bearing date on the seventh day of November, 1844, and hereto annexed, personally appeared before us this day, in our county aforesaid, the said Henry M. Morfit, trustee, personally being well known to us as the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under our hands and seals this thirteenth day of November, eighteen hundred and forty-four.

[SEAL.] B. K. MORSELL, *J. P.*
[SEAL.] CLEM'T T. COOTE, *J. P.*

(On back of above:)

This is to certify that the within is a true and verified copy of a deed as recorded in Liber W. B., No. 112, fol. 285 et seq., one of the land records of this office.

October 16, '71.

[SEAL.] S. WOLF, *Recorder.*
GEO. F. SCHAYER,
Dep.

75 *Exhibit Pl'ff 3.*

John Gadsby to Walker & Kimmell. Recorded 29 August, 1842. Liber W. B., No. 96, fol. 234.

This indenture, made this seventeenth day of August, eighteen hundred and forty-two, between John Gadsby, of the one part, and Edwin Walker and Abraham F. Kimmell, known as the firm of Walker and Kimmell, of the other part, all of the city of Washington, in the District of Columbia, witnesseth:

Whereas the said John Gadsby, at the time of sealing and delivery of these presents, is served in fee of and in lot number three, in square number four hundred and ninety, in the city of Washington, aforesaid; and whereas *their* is said and believed to be a never-failing spring of water in and upon said lot number three:

76 Now this indenture witnesseth that the said John Gadsby, for divers good causes, and more especially for and in consideration of the sum of one dollar current money of the United States to him in hand paid by the said Edwin Walker and Abraham F. Kimmell before the sealing and delivery hereof, the receipt of which is hereby acknowledged, hath given, granted, bargained, and sold, aliened, released, surrendered, and confirmed, and by these presents do give, grant, bargain, and sell, alien, release, surrender, and confirm, unto the said Walker and Kimmell, their heirs and assigns, forever, the right, privilege, and immunity to water from said spring, to be conducted in pipes sufficient in quantity for all necessary purposes and uses of the stables known as the National Livery Stables, situate on lot number sixteen, in square
77 number four hundred and ninety-one, in said city, together with free ingress, egress and regress to and for the said Edwin Walker and Abraham F. Kimmell, their heirs and assigns, and their workmen, at all convenient times and seasons, through the land of the said John Gadsby, his heirs and assigns, for the laying down of pipes, attaching a pipe to said spring, amending, cleaning, and repairing the same when as often as need be or occasion require. To have and to hold all and singular the rights, privileges, and immunities hereby granted or mentioned, or intended so to be, unto the said Edwin Walker and Abraham F. Kimmell, to their own proper use, benefit, and behoof, their heirs, and assigns, forever.

In testimony whereof the said John Gadsby hath hereunto set his hand, seal, the day and year first herein written.

JOHN GADSBY. [SEAL.]

78 Signed, sealed, and delivered in presence of—
B. K. MORSELL.
W. THOMPSON.

DISTRICT OF COLUMBIA,
County of Washington, to wit:

We, Benjamin K. Morsell and William Thompson, justices of the peace in and for the county aforesaid, in the District of Columbia, do hereby certify that John Gadsby, a party to a certain deed, bearing date on the seventeenth day of August, 1842, and hereto annexed, personally appeared before us this day, in our county aforesaid, the said John Gadsby being personally well known to us as the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under our hands and seals this the twenty-six day of August, in the year eighteen hundred and forty-two.

[SEAL.] B. K. MORSELL, *J. P.*
[SEAL.] W. THOMPSON, *J. P.*

(Recorder's certificate on back of this deed.)

79 *Exhibit Pl'ff 4.*

Walker & Kimmell to Voltaire Willett. Deed of trust, recorded 7th June, 1851.

This indenture, made this thirty-first day of May, in the year eighteen hundred fifty-one, by and between Edwin Walker and Abraham F. Kimmell, and Maria Ann Sophia Kimmell, his wife, of the city of Washington, D. C., of the first part, and Voltaire Willett, of the second part.

Whereas John Gadsby and Parry, his wife, by their certain deed, recorded among the land records of Washington County, in the District

of Columbia, in Lib. W. B., No. 96, at folio 236 et seq., heretofore conveyed to the said Abraham and Edwin the parcel of ground hereinafter described; and whereas the said John Gadsby, by his deed of even
80 date with the said last mentioned indenture, and recorded in ib. Lib., folio 234 et seq., did convey unto the said Walker and Kimmell, their heirs and assigns, a certain water-right privilege and immunity to take water from a certain spring in lot No. 3, in square No. 490, in said city, and a certain right of way and easement, more particularly described in said deed; and whereas the said conveyances were intended to be made to the said Edwin and Abraham, and their heirs, as tenants in common and not as joint tenants, but were inartificially drawn so as to convey to the parties, contrary to their intentions, estates in joint tenancy; and it is the purpose of the said Edwin and Abraham now to correct the same error:

Now, therefore, this indenture witnesseth that the said parties of the first part, in consideration of the premises, and of the sum
81 of five dollars to them in hand paid by the said party of the second part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, aliened, enfeoffed, released, and confirmed, and by these presents do grant, bargain, and sell, alien, enfeoff, release, and confirm unto them, the said party of the second part, and his heirs and assigns, all that certain parcel of ground situate in the city of Washington, and District aforesaid, and composed of the whole of lot numbered sixteen and part of lot numbered seventeen, in the square numbered four hundred and ninety-one, in said city, as the said square and lots are designated and laid down on the official plat of said city, begin-
82 ning for the parcel of ground at a point on the line of C street north, two hundred and seventy-four feet one inch and a half from the northeast corner of said square, and running thence east with the said line to the eastern boundary line of said lot No. 16; thence due south one hundred and four feet and eleven inches; thence southeastwardly forty-three feet six inches along the line of an alley, the right to and to use of which was intended by the said deed of Gadsby and wife to be received in perpetuity, for the benefit of said lots numbered sixteen and seventeen; thence due south twenty-nine feet eight inches along the west line of the said alley to a public alley thirty feet wide; thence northwestwardly, ninety-one feet six inches along the line of said alley, thirty feet wide, to another public alley said to be fifteen feet
83 wide; thence due north one hundred and twenty-seven feet one inch along the line of said last mentioned alley to the place of beginning; together with all and singular the buildings, improvements, rights, ways, privileges, and appurtenances to the same belonging or in any wise appertaining. And also all the easement, water-right privilege, and immunity, and right of ingress, egress, and regress described and intended to be conveyed by the said deed of the said John Gadsby, hereinbefore referred to. To have and to hold all and singular the premises hereinbefore granted unto him, the said party of the second part, and his heirs and assigns, forever, to his and their sole use, benefit, and behoof, forever. In trust, nevertheless, immediately upon the execution and delivery of these presents to reconvey the said
84 lot and part of lot of ground and premises, and the said water-right privilege and immunity, easement, and right of way, and all and singular the premises and appurtenances, rights, and estates hereby granted unto him, unto them, the said Edwin Walker and Abraham F. Kimmell, and their heirs and assigns, forever, as tenants in common

and not as joint tenants, and upon no other trust, and to and for no other intent or purpose whatever.

In testimony whereof the said parties of the first part have hereto set their hands and seals the day and year aforesaid.

EDWIN WALKER. [SEAL.]
A. F. KIMMELL. [SEAL.]
M. A. S. KIMMELL. [SEAL.]

Signed, sealed, & delivered in presence of—
T. C. DONN.
B. K. MORSELL.

85 DISTRICT OF COLUMBIA,
Washington County, sct:

We, Thomas C. Donn and Benjamin K. Morsell, two justices of the peace in and for the county aforesaid, do hereby certify that Edwin Walker and Abraham F. Kimmell, parties to a certain deed bearing date the thirty-first day of May, in the year 1851, and hereto annexed, personally appeared before us, in our county aforesaid, they the said Edwin and Abraham being personally well known to us as the persons who executed the said deed, and acknowledged the same to be their act and deed. And we, the said parties, do hereby further certify that Mary Ann Sophia Kimmell, the wife of the said Abraham F. Kimmell, also a party to the said deed bearing date as aforesaid, and hereto
86 annexed, personally appeared before us, in our county aforesaid, she, the said Mary Ann Sophia being personally well known to us as the person who executed the said deed, and being by us examined privily and apart from her said husband, and having the deed aforesaid fully explained to her, she the said Mary Ann Sophia acknowledged and declared that she had willingly and freely signed, sealed, and delivered the said deed, and that she wished not to retract it.

Given under our hands and seals this thirty-first day of May, in the year 1851.

[SEAL.] T. C. DONN, *J. P.*
[SEAL.] B. K. MORSELL, *J. P.*

(Recorder's certificate and seal on the back of the above.)

87 *Exhibit Pl'ff 5.*

Abraham F. Kimmell & al. to Kellellum H. Lambell. Deed in trust Recorded 26th April, 1859. Liber, A. S. J., No. 173, fol. 281.

This indenture, made this sixteenth day of November, in the year of our Lord eighteen hundred and fifty-eight, between Abraham F. Kimmell and Mary A. S. Kimmell his wife, of the first part, Voltaire Willett, trustee, as hereinafter mentioned, of the second part, and Kellellum H. Lambell of the third part, all of Washington City, in the District of Columbia.

Whereas the lots and parts of lots hereinafter conveyed were heretofore held by the above-named Abraham F. Kimmell and one Edwin Walker as tenants in common, they being at the same time partners in the business of keeping a livery and hiring stable at the city
88 of Washington under the firm of Walker & Kimmell; and whereas the said partnership afterwards, to wit, on the 8th day of October, 1867, was dissolved; and the said Edwin Walker, on or about that day, executed and delivered to the above-named Voltaire Willett a cer-

tain deed, whereby he amongst other things conveyed to the said Voltaire Willett all his the said Walker's estate and legal title in and to the said parcels of ground, upon certain trusts in the said deed set forth, and amongst other things subject to the rights of said Kimmell in winding up and paying off the debts of the said dissolved partnership; and whereas the said firm was and is indebted to M'r's Elizabeth C. Foulkes in the sum of two thousand dollars, together with interest thereon at the rate of six per centum per annum from the sixteenth day of No-
89 vember, in the year eighteen hundred and fifty-three, being for so much money of the separate estate of the said M'r's Elizabeth E. Foulkes then loaned and advanced to the said firm; and the said Kimmell for the payment of the said debt and interest, and for the purpose of winding up and paying off the debts of the said dissolved partnership, and ascertaining and paying over to the said Voltaire Willett, to be applied by him according to the subsequent trusts of the said deed, the amount, if any, which may be found due to the said Walker, hath agreed to sell to the said M'r's Elizabeth E. Foulkes the said lots and parcels of ground in consideration of the sum of five thousand dollars, which sum is to be paid at the delivery of these presents, by
90 the satisfaction of the aforesaid debt and interest, and the balance at the same time to be paid or secured to the satisfaction of the said Kimmell; and whereas the said Lambell is the trustee of the separate estate of the said M'r's Elizabeth E. Foulkes, and as such joins in these presents:

Now, therefore, this indenture witnesseth that the said parties of the first and seconds parts, in consideration of the premises and of the sum of five dollars to them respectively in hand paid by the said party of the third part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained and sold, aliened, enfeoffed, released, and confirmed, and by these presents do grant, bargain and sell, alien, enfeoff, release, and confirm
91 unto the said party of the third part, his heirs and assigns, all that west half of a lot of ground situated in Washington City, D. C., and designated on the plan thereof as lot numbered eighteen (18) in square numbered four hundred and ninety-one (491), which is as follows: Beginning for the same on the north C street, at a point twenty-five (25) feet from the dividing line between lots eighteen (18) and nineteen (19) in said square, and running thence west along the line of C street north twenty-five (25) feet to the dividing line between lots seventeen (17) and eighteen (18) in that square; thence at a right angle with C street north and along the dividing line between lots seventeen (17) and eighteen (18) south one hundred and forty-one feet five inches (141 f't, 5 in.) to the alley in the rear; thence eastwardly along the line of that alley
92 twenty-five feet three inches (25 f't, 3 in.); thence on a line parallel to the dividing line between lots seventeen (17) and eighteen (18) from the line of said alley in the rear, north up to C street at the point of beginning; and also the following described part of lot seventeen (17) in said square, beginning for the same at the dividing line of lots sixteen (16) and seventeen (17) on the public alley, and running along such dividing line (north) to a point on the private alley distant therefrom about twenty-eight feet eleven inches and three-fourths of an inch (28, 11¾ in.); thence along the line of said alley in a southeasterly direction about forty-four feet six inches (44 f't, 6 in.); thence along the line of said alley south twenty-nine feet (29 f't) eight inches (8 in.) to a point on the public alley; thence along the line of said alley
93 about forty-five feet five inches (45 f't, 5 in.) to the beginning, and

being the division lines of lots sixteen and seventeen (16 & 17) on such alley, the private alley above referred to being in perpetuity for the use and benefit of lots sixteen (16) and seventeen (17), with all and singular the improvements, buildings, hereditaments, rights, liberties, privileges, and other premises, with the appurtenances unto each of the parts of said lots belonging; to have and to hold the same unto the said party of the third part and his heirs upon and for the following uses, trusts, and purposes, that is to say, upon the trusts to hold the same in fee simple for the use and benefit of Elizabeth E. Foulkes, to be free from and of the control, care, and interest of her present or any future husband she may hereafter have, and to be wholly free from
94 and discharged and not liable to the creditors of any such husband, present or future, or of any debts now existing or hereafter contracted by any such husband, and free from any estate by the curtisy in any such husband; and also upon the trust to suffer and permit the said Elizabeth E. Foulkes to either occupy or lease the said lots and premises and receive the rents and sign receipts therefor, and also upon the trust to allow her to sell or mortgage the same by any writing she may execute, and the said party of the third part shall make to such purchaser or mortgagee a deed in fee-simple therefor, and also upon the trust to convey the same to any person or persons that she shall by any writing or lease, will, and testament, duly executed by her, direct
95 and appoint, and in case of any such failure by her to devise or dispose thereof by any last will or testament (and which is to be made without the consent or action of any husband whatsoever) to hold the same and convey the said real estate by good and sufficient deed to her heirs at law that may be living at the time of her death.

And the said Abraham F. Kimmell, for himself and his heirs, doth hereby covenant and agree to and with the said party of the third part, his heirs and assigns, that he, the said Abraham F. Kimmell, and his heirs shall and will hereafter warrant and forever defend the aforesaid parts of lots and premises above bargained and sold, or intended to be, unto the said party of the third part, against all persons claiming or to claim any estate, right, title, or interest, legal or equitable, therein or thereto.

96 In testimony whereof the said Abraham F. Kimmell and Mary A. S. Kimmell, his wife, parties of the first part, and the said Voltaire Willett, party of the second part, have hereunto respectively set their hands and affixed their seals the day and year first aforesaid.

A. F. KIMMELL. [SEAL.]
M. A. S. KIMMELL. [SEAL.]
V. WILLETT, [SEAL.]
As Trustee for Edwin Walker.

Signed, sealed, and delivered in presence of—
B. W. FERGUSON.
G. L. GIBERSON.

DISTRICT OF COLUMBIA,
County of Washington, sct:

We, B. W. Ferguson and Gilbert L. Giberson, justices of the peace in and for the county aforesaid, do hereby certify that Abraham
97 F. Kimmell and Voltaire Willett, parties to a certain deed bearing date on the sixteenth day of November, in the year of our Lord eighteen hundred and fifty-eight, and hereto annexed, personally appeared before us, in our county aforesaid, the said Abraham F. Kimmell

and Voltaire Willett, being personally well known to us as the persons who executed the said deed, and acknowledged the same to be their act and deed.

Given under our hands and seals this sixteenth day of November, 1858.

[SEAL.] B. W. FERGUSON, *J. P.*
[SEAL.] GILBERT L. GIBERSON, *J. P.*

DISTRICT OF COLUMBIA,
County of Washington, sct:

We, B. W. Ferguson and Gilbert L. Giberson, justices of the peace in and for the county aforesaid, do hereby certify that Mary A.
98 S. Kimmell, the wife of Abraham F. Kimmell, party to a certain deed bearing date on the sixteenth day of November, in the year of our Lord eighteen hundred and fifty-eight, and hereunto annexed, personally appeared before us, in our county aforesaid, the said Mary A. S. Kimmell being well known to us as the person who executed the said deed, and being by us examined privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said Mary A. S. Kimmell, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under our hands and seals this sixteenth day of November, 1858.

[SEAL.] B. W. FERGUSON, *J. P.*
[SEAL.] GILBERT L. GIBERSON, *J. P.*

(Recorder's certificat' & seal on back.)

99 *Exhibit Pl'ff 6.*

Elizabeth A. Foulke & al. to Abraham F. Kimmell. Deed, recorded 28 April, 1868, Liber E. C. E., No. 31, fol. 495.

This indenture, made this nineteenth day of February, in the year eighteen hundred and sixty-four, by and between Elizabeth A. Foulkes, of the first part, Kellellum H. Lambell, trustee as hereinafter mentioned, of the second part, and Abraham F. Kimmell, of the third part, all of the city of Washington, D. C.

Whereas the said Lambell, under and by virtue of two certain conveyances, bearing date respectively the sixteenth of November, eighteen hundred and fifty-eight, and the twenty-sixth of April, eighteen hundred and fifty-nine, recorded among the land records of Wash-
100 ington County, D. C., in liber J. A. S., No. 173, folio 281, &c., and liber J. A. S., No. 181, fol. 307, holds as trustee for the said Elizabeth A. (erronously called in said deed Elizabeth E.), the parcels of ground in said deeds described, being certain parcels of ground situate and being in the city of Washington aforesaid, in the square designated on the official plat and ground plan of said city as square numbered four hundred and ninety-one (No. 491), and in lots numbered 17 and 18 in said square, for a particular description whereof reference is made to the said deed above referred to; and whereas in and by the deeds the absolute disposition of the said ground and appurtenances in fee simple *and* reserved to the said Elizabeth, and the said Lambell was bound as trustee to make conveyance of the legal title as might be directed
101 and required by the said Elizabeth as she herein and hereby directs and requires:

Now, therefore, this indenture witnesseth that the said Elizabeth A. Foulkes having directed and requested the said Lambell, trustee as aforesaid, to join in the execution of these presents for the conveyance of the ground and premises aforesaid to the said Kimmell, they, the said Elizabeth A. Foulkes and Kellellum H. Lambell, in consideration of the premises and of the sum of five dollars to them and each of them in hand paid, at and before the ensealing and delivery of these premises by the said Kimmell, have granted, bargained, and sold, aliened, enfeoffed, released, and confirmed, and by these presents do grant, bargain, and sell, alien, enfeoff, release, and confirm, unto him, the said
102 Abraham F. Kimmell, and his heirs and assigns, all the right, title, interest, and estate at law and in equity of them, the said parties of the first and second part respectively, of and to the parcels of land aforesaid; that is to say, the said lots numbered seventeen (17) and eighteen (18) in square numbered four hundred and ninety-one (491), in said city of Washington; together with all the buildings, improvements, rights, ways, privileges, waters, and appurtenances to the same belonging, or in anywise appertaining; to have and to hold all and singular the premises and appurtenances unto him, the said Abraham F. Kimmell, and his heirs and assigns, forever, to his and their use and behoof forever.

In testimony whereof they, the said parties of the first and second part, have hereto set their hands and seals the day and year aforesaid.

ELIZ. A. FOULKES. [E. A. F. SEAL.]
K. H. LAMBELL, [K. H. L. SEAL.]
Trustee.

[Rev. stamps, $20.]

103 DISTRICT OF COLUMBIA,
Washington County, set:

On this twenty-second day of February, 1864, before me, the subscriber, a notary public in and for the county aforesaid, personally appeared Elizabeth A. Foulke and Kellellum H. Lambell, to me both personally well known, and severally acknowledged the aforegoing instrument, bearing date the nineteenth day of February, 1864, to be their act and deed of each of them.

Given under my hand and notarial seal this twenty-second day of February, in the said year eighteen hundred and sixty-four.

[SEAL AFFIXED.] W. E. HOWARD,
Notary Public.

[Rev. stamp 5 cts.]

(Recorder of deed's seal and certificate of true copy on back.)

104 *Commission to take testim'y.*

In the supreme court of the District of Columbia, the 29th day of November, 1871.

G'DDIN, APPERSON, ET AL. *vs.* M. A. S. KIMMELL ET AL. } No. 2267. Eq. Doc. 10.

The President of the United States to Robert D. Wood and Edgar M. Garnett, Richmond, Virginia, greeting:

Know ye that, in confidence of your prudence and fidelity, you have been appointed, and by these presents you, or any two of you, are in-

vested with power and authority to examine such witnesses as may be brought before you as witnesses for the complainants in the above-entitled cause, upon the interrogatories annexed to this commission; and therefore you are hereby commanded at a certain day and place,
105 or certain days and places, to be appointed by you, to cause said witnesses to come before you and then and there examine them, on oath or affirmation, upon the said interrogatories, and reduce their testimony into writing, to be signed by said witness; and having so done, annex the same to this writ, closed up under your seals and make return thereof into said court with all convenient speed.

Witness, D. K. Cartter, chief justice
[SEAL.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

Interrogatories on behalf of plaintiffs. (Exhibit B.)—Filed Sep. 20, 1872.

In the supreme court of the District of Columbia, November the twenty-ninth, A. D. 1871.

GODDEN, APPERSON, ET AL.
vs.
M. A. S. KIMMELL ET AL.
} No. 2267. Eq. doc. 10.

Interrogatories to be propounded, on the part of the complain-
106 ants in the above-entitled cause, to the hereinafter named witnesses:

First interrogatory. State your name, age, residence, and occupation.

Second interrogatory. Were you or were you not acquainted with one Edwin Walker, now deceased? And, if aye, state what time your acquaintance commenced, how long it continued, where said Walker resided during your acquaintance with him, and in what business he was engaged.

Third interrogatory. State the business in which you were engaged in and prior to October, 1857; if in a firm give its firm-name, and the names in full of the members, and what has become of the said firm.

Fourth interrogatory. File all evidence of indebtedness due by
107 said Walker to you or to your firm, giving the firm name and the names of the members.

Fifth interrogatory. Give the date of said indebtedness, and to whom it was and is due; how it occurred; filing all papers throwing light on your answers and referred to by you in your answer.

Sixth interrogatory. If any of said indebtedness be in writing under said Walker's hand, state whether or not you know the same to be in his handwriting.

Seventh interrogatory. Look at any papers here filed, and state in whose handwriting the same are.

Eighth interrogatory. Look at Exhibit Z, filed with this commission,
and state all you know about it, particularly with reference to
108 any debts due to any parties therein named, and all that was told you by said Walker about the same.

Ninth interrogatory. Look at Exhibit Z, filed with this commission, and state all you know about it, particularly with reference to any debts due to any parties therein named other than yourself, and all that was told you by said Walker about the said debts. Be careful to say nothing about any conversations occurring between said Walker and

yourself with reference to any debt due to you by him, in your answer to this question.

Tenth interrogatory. Have you any of the notes or papers mentioned in said exhibit? And, if so, file them, properly marked, so as to identify them; if not, state where they are.

109 Eleventh interrogatory. State what part of the debts mentioned in the said Exhibit Z have been paid to you, or any agent of yours, or to any the parties therein named, or to any agent of theirs, so far as you know the same.

Twelfth interrogatory. State fully why you have not prosecuted your remedies on the above-mentioned debts due you by said Edwin Walker, deceased, before this, and what measures you have taken for the collection of your said debts.

Thirteenth interrogatory. State all you know about the property mentioned in the above Exhibit Z; who were in possession of it at the date of the execution of the instrument of which said exhibit is a copy; who have been in possession since that time, so far as you know;

110 its annual value if rented, and all you know about the value of the same.

The above interrogatories are to be propounded on the part of the complainants to each of the following-named witnesses, or to any of them, viz: to Wellington Godden, James L. Apperson, Robert Edmund, Isaacs Davenport, jr., J. H. Blair, William M. Sutton, E. T. Winston, William B. Isaacs, William Garland, F. H. Deane, jr., Peter J. Crew, John A. Hutcheson, James Gardiner, Philip P. Winston, Hunton H. Marshall, James C. Johnson, and to others who may be produced before the commissioners.

The complainants name as commissioners Robert D. Wood and Edgar M. Garnett, at Richmond, Virginia.

W. S. COX,
JNO. F. HANNA,
For Compl'ts.
JNO. D. McPHERSON,
RICHARD L. WALLACH,
For Defendants.

111 *Exhibit Z.*

Edwin Walker to Voltaire Willett.—Deed of trust, recorded 22d July, 1858.

This indenture, made this 8th day of October, in the year 1857, between Edwin Walker, of the first part, and Voltaire Willett, of the second part, and certain creditors named in Schedules B & C, hereto annexed as part of this deed, of the third part:

Whereas Edwin Walker and A. F. Kimmell have been engaged as partners under the style of Walker & Kimmell in the city of Washington, and in the progress of said partnership they have acquired certain real estate on C street between 4½ and 6 streets, in said city; also certain personal property, including horses, carriages, buggies, sulkeys,

112 and other property, and hold claims against different persons; and whereas they are indebted to various persons in different amounts; and whereas Edwin Walker, independently of his indebtedness as a member of the firm of Walker & Kimmell, is indebted in a large amount to persons named in Schedules B & C, and after paying all of the debts of the firm of Walker & Kimmell desires to convey his

interest in the firm of Walker & Kimmell in trust to secure pro rata the debts in Schedule B, and after paying off the debts in Schedule B in full, if sufficient therefor, to secure the debts in Schedule C pro rata, and if sufficient to pay off Schedule C in full, to discharge them in full:

Now, therefore, this deed witnesseth that said Edwin Walker, in consideration of the premises and of the sum of one dollar to him in
113 hand paid by said party of the second part before the sealing and delivery of these presents, the receipt whereof he doth hereby acknowledge, hath granted, bargained, sold, assigned, transferred, and conveyed, and by these presents doth grant, bargain, sell, assign, transfer, and convey, unto said Voltaire Willett, his heirs, executors, administrators, and assigns forever, all of his, the said Edwin Walker's, right, title, and interest in and to the real and personal property, debts, effects, credits, and assets of every kind whatever and in any manner belonging to the firm of Walker & Kimmell, but subject to the debts and liabilities due from said firm, and to the rights of said Kimmell in winding up and paying off the same, the true intent and meaning of this deed being only to convey whatever interest said Walker may be entitled to after
114 all of the liabilities of Walker & Kimmell have been paid off and discharged. To have and to hold the said interest of said Edwin Walker in said firm of Walker & Kimmell, but subject to the liabilities thereof unto the said Voltaire Willett, his heirs and assigns, and unto the only proper use and behoof of said Voltaire Willett, his heirs, executors, administrators, and assigns forever. But upon special trust that said Voltaire Willett will collect the interest of said Edwin Walker in said firm of Walker & Kimmell, and after paying the costs and charges attending this trust will, in the first place, pay the debts in Schedule B in full, if sufficient therefor, but if not sufficient therefor, will pay the same pro rata, but if more than enough to pay the debts in
115 Schedule B in full, will, in the second place, pay off the debts in Schedule C in full, if sufficient therefor, but if not sufficient, will pay the debts in Schedule C pro rata, and if more than enough to pay the debts in both B & C, will pay any surplus to said Edwin Walker, his executors, administrators, or assigns.

In testimony whereof the parties hereto have set their hands and affixed their seals the day and year first hereinbefore written.

EDWIN WALKER. [SEAL.]
VOLTAIRE WILLETT. [SEAL.]

STATE OF VIRGINIA,
City of Richmond, to wit:

We, C. B. Hill and George E. Sadler, justices of the peace for the city of Richmond, in the State of Virginia, do certify that Edwin Walker, a resident of said city, and a person to us well known, and a party
116 to the deed hereto annexed, bearing date the 8th day of October, 1857, this day personally appeared before us, in our said city, and acknowledged the same to be his act and deed, and desired us to certify the said acknowledgement in order that said deed may be recorded in the proper court or office for the city of Washington, in the District of Columbia.

Given under our hands and seals this 17th day of October, 1857.

[SEAL.] C. R. HILL, *J. P.*
[SEAL.] GEO. E. SADLER, *J. P.*

STATE OF VIRGINIA,
City of Richmond, to wit:

I, Robert Howard, clerk of the court of hustings for said city, do

hereby certify that C. B. Hill and Geo. E. Sadler, whose names are signed to the above certificate, are now and were at the time of
117 signing the same acting justices of the peace in and for said city, duly qualified, and that their said signatures are genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 21st day of July, 1858.

RO. HOWARD, *Clk.*

SCHEDULE B.

List of drafts, notes, & bonds due by Edwin Walker.

Note or draft.	Drawer.	Endorser.	When due.	Amount.
Draft	J. H. Allen, on E. W	J. H. Allen	18-21 Sept., 1857	450 00
Do	G. M. Bum, on E. W	M. Thompson	25-28 " "	900 00
Note	Edwin Walker	B. W. G., E. Davenport & Co	22 Dec., "	3,189 07
Draft	J. A. J. Lee, on E. W		21-24 Sept., "	850 00
Note	E. Walker	J. J. E. True	14-17 Oct., "	1,300 00
Do	do	M. Weiseger & Co	3-6 " "	692 50
Do	do	E. J. Winston & Co	10-13 " "	1,500 00
Bond	E. Walker, & B. W. Green	J. Bernard	1st " "	800 00
Draft	E. Walker	B. W. Green & E. J. Winston & Co	18-21 " "	1,500 00
Note	B. W. Green	E. W. Baldwin & Co	24-27 " "	181 65
Do	E Walker	B W. Green, T. T. Philips	27-30 " "	450 00
118 Note	E. Walker	B. W. Green	13-16 Oct., 1857	125 00
Draft	J. A. J. Lee, on E. Walker		21-24 " "	850 00
Note	E. Walker	B. W. Green, Bernays	22-25 " "	325 00
Draft	E. Walker	B. W. G., Peters, Spence & Co	11-14 " "	5,588 84
Draft	J. H. Allen, on E. W	J. H. Allen	18-21 Nov., "	2,770 00
Note	J. Steer & Co	Dudley & Johnson	12-15 " "	612 50
Do	E. Walker	J. D. Thomas, E. T. Winston & Co	1-4 " "	1,560 00
Do	B. W. Green	E. Davenport & Co	3-6 " "	1,064 43
Do	E. Walker	J. D. Thomas, T. P. Winston	13-16 " "	1,750 00
Do	E. Walker	M. Weiseger & Co	16-19 " "	397 38
Do	E. Walker	J. D. Thomas, Fry & Sons	17-20 " "	1,500 00
Do	E. Walker	J. D. Thomas, A. L. Deewit	18-21 " "	1,500 00
Draft	E. Walker, E. W	V. C. Peter	20-23 " "	325 00
Note	E. Walker	B. W. Green, Jno. Enders	18-21 " "	1,500 00
Note	E. Walker	B. W. Green, E. N. Dabney	1-4 " "	229 50
Note	E. Walker	R. M. Neimmo	21-24 " "	205 53
Draft	B. Pelcher, on B. W. G	Benford & Porter	29-1 " "	90 00
Note	E. Walker	J. D. Thomas, Va. C. R. R. Co	24 " "	1,500 00
Note	E. Walker	Godden & Apperson	8-11 " "	2,235 74
Note	E. Walker	B. W. G., I. C. Johnson	9-12 " "	1,374 57
	Carried forward			37,286 71
	Bro't forward			37,286 71
Draft	R. Bridgewater, on B. W. G	W. F. Hird	6-9 Nov., 1857	172 75
119 Note	B. W. Green	E. Davenport & Co	25-28 Nov., 1857	369 60
Draft	E. Walker accep	Clark & Coffin	1-4 " "	1,410 00
Do	do do	Clark & Corbin	" "	2,558 00
Note	E. Walker	B. W. Green & F. H. Deane	3 Dec, "	300 00
Do	Do	do J. C. Deaten	3 Dec., "	170 00
Note	E. Walker	J. D. Thomas, W. Haller	5-8 Dec., 1857	1,500 00
Do	do	N. Tensley Pate	30-3 " "	160 53
Do	do	Dudley & Johnson	1-4 " "	778 82
Do	do	J. D. Thomas, G. J. Apperson	3-6 " "	2,388 33
Do	do	Smith & Harwood	10-13 " "	248 34
Do	do	Alex'r Hill	5-8 " "	516 13
Do	do	Mark Downey	8-11 " "	264 46
Do	do	John A. Lacy	10-13 " "	608 39
Do	B. W. Green	E. Davenport & Co	17-20 " "	610 34
Do	E. Walker	J. H. Wickham, Va. C. R. R.	2d " "	2,000 00
Do	do	B. W. Green	1-4 " "	3,500 00
Draft	E. Walker, W & K	J Stearns & Co	5-8 " "	4,310 59
Note	E. Walker	B. Pilcher	12-15 " "	300 00
Note	do	A. B. Hutcheson	13-16 " "	450 00
Note	B. W. Green	E. Walker, R. D. Philips	19-22 " "	283 00
Note	E. Walker	J. H. Wickham. E. D. & Co	14-17 Jan'y, 1858	4,000 00
Note	B. W. Green	Godden & Apperson	6-9 " "	237 54

interest in the firm of Walker & Kimmell in trust to secure pro rata the debts in Schedule B, and after paying off the debts in Schedule B in full, if sufficient therefor, to secure the debts in Schedule C pro rata, and if sufficient to pay off Schedule C in full, to discharge them in full:

Now, therefore, this deed witnesseth that said Edwin Walker, in consideration of the premises and of the sum of one dollar to him in
113 hand paid by said party of the second part before the sealing and delivery of these presents, the receipt whereof he doth hereby acknowledge, hath granted, bargained, sold, assigned, transferred, and conveyed, and by these presents doth grant, bargain, sell, assign, transfer, and convey, unto said Voltaire Willett, his heirs, executors, administrators, and assigns forever, all of his, the said Edwin Walker's, right, title, and interest in and to the real and personal property, debts, effects, credits, and assets of every kind whatever and in any manner belonging to the firm of Walker & Kimmell, but subject to the debts and liabilities due from said firm, and to the rights of said Kimmell in winding up and paying off the same, the true intent and meaning of this deed being only to convey whatever interest said Walker may be entitled to after
114 all of the liabilities of Walker & Kimmell have been paid off and discharged. To have and to hold the said interest of said Edwin Walker in said firm of Walker & Kimmell, but subject to the liabilities thereof unto the said Voltaire Willett, his heirs and assigns, and unto the only proper use and behoof of said Voltaire Willett, his heirs, executors, administrators, and assigns forever. But upon special trust that said Voltaire Willett will collect the interest of said Edwin Walker in said firm of Walker & Kimmell, and after paying the costs and charges attending this trust will, in the first place, pay the debts in Schedule B in full, if sufficient therefor, but if not sufficient therefor, will pay the same pro rata, but if more than enough to pay the debts in
115 Schedule B in full, will, in the second place, pay off the debts in Schedule C in full, if sufficient therefor, but if not sufficient, will pay the debts in Schedule C pro rata, and if more than enough to pay the debts in both B & C, will pay any surplus to said Edwin Walker, his executors, administrators, or assigns.

In testimony whereof the parties hereto have set their hands and affixed their seals the day and year first hereinbefore written.

EDWIN WALKER. [SEAL.]
VOLTAIRE WILLETT. [SEAL.]

STATE OF VIRGINIA,
City of Richmond, to wit:

We, C. B. Hill and George E. Sadler, justices of the peace for the city of Richmond, in the State of Virginia, do certify that Edwin Walker, a resident of said city, and a person to us well known, and a party
116 to the deed hereto annexed, bearing date the 8th day of October, 1857, this day personally appeared before us, in our said city, and acknowledged the same to be his act and deed, and desired us to certify the said acknowledgement in order that said deed may be recorded in the proper court or office for the city of Washington, in the District of Columbia.

Given under our hands and seals this 17th day of October, 1857.

[SEAL.] C. R. HILL, *J. P.*
[SEAL.] GEO. E. SADLER, *J. P.*

STATE OF VIRGINIA,
City of Richmond, to wit:

I, Robert Howard, clerk of the court of hustings for said city, do

hereby certify that C. B. Hill and Geo. E. Sadler, whose names are signed to the above certificate, are now and were at the time of
117 signing the same acting justices of the peace in and for said city, duly qualified, and that their said signatures are genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 21st day of July, 1858.

RO. HOWARD, *Clk.*

SCHEDULE B.

List of drafts, notes, & bonds due by Edwin Walker.

Note or draft.	Drawer.	Endorser.	When due.	Amount.
Draft	J. H. Allen, on E. W	J. H. Allen	18-21 Sept., 1857	450 00
Do	G. M. Bum, on E. W	M. Thompson	25-28 " "	900 00
Note	Edwin Walker	B. W. G., E. Davenport & Co	22 Dec., "	3,189 07
Draft	J. A. J. Lee, on E. W		21-24 Sept., "	850 00
Note	E. Walker	J. J. E. True	14-17 Oct., "	1,300 00
Do	do	M. Weiseger & Co	3-6 " "	692 50
Do	do	E. J. Winston & Co	10-13 " "	1,500 00
Bond	E. Walker, & B. W. Green	J. Bernard	1st " "	800 00
Draft	E. Walker	B. W. Green & E. J. Winston & Co	18-21 " "	1,500 00
Note	B. W. Green	E. W. Baldwin & Co	24-27 " "	181 65
Do	E Walker	B W. Green, T. T. Philips	27-30 " "	450 00
118 Note	E. Walker	B. W. Green	13-16 Oct., 1857	125 00
Draft	J. A. J. Lee, on E. Walker		21-24 " "	850 00
Note	E. Walker	B. W. Green, Bernard	22-25 " "	325 00
Draft	E. Walker	B. W. G., Peters, Spence & Co	11-14 " "	5,588 84
Draft	J. H. Allen, on E. W	J. H. Allen	18-21 Nov., "	2,770 00
Note	J. Steer & Co	Dudley & Johnson	12-15 " "	612 50
Do	E. Walker	J. D. Thomas, E. T. Winston & Co	1-4 " "	1,560 00
Do	B. W. Green	E. Davenport & Co	3-6 " "	1,064 43
Do	E. Walker	J. D. Thomas, T. P. Winston	13-16 " "	1,750 00
Do	E. Walker	M. Weiseger & Co	16-19 " "	397 38
Do	E. Walker	J. D. Thomas, Fry & Sons	17-20 " "	1,500 00
Do	E. Walker	J. D. Thomas, A. L. Deewit	18-21 " "	1,500 00
Draft	E. Walker, E. W	V. C. Peter	20-23 " "	325 00
Note	E. Walker	B. W. Green, Jno. Enders	18-21 " "	1,500 00
Note	E. Walker	B. W. Green, E. N. Dabney	1-4 " "	229 50
Note	E. Walker	R. M. Nemmo	21-24 " "	205 53
Draft	B. Pelcher, on B. W. G	Benford & Porter	29-1 " "	90 00
Note	E. Walker	J. D. Thomas, Va. C. R. R. Co	24 " "	1,500 00
Note	E. Walker	Godden & Apperson	8-11 " "	2,235 74
Note	E. Walker	B. W. G., I. C. Johnson	9-12 " "	1,374 57
	Carried forward			37,286 71
	Bro't forward			37,286 71
Draft	R. Bridgewater, on B. W. G	W. F. Hird	6-9 Nov., 1857	172 75
119 Note	B. W. Green	E. Davenport & Co	25-28 Nov., 1857	369 60
Draft	E. Walker accep	Clark & Coffin	1-4 " "	1,410 00
Do	do do	Clark & Corbin	" "	2,558 00
Note	E. Walker	B. W. Green & F. H. Deane	3 Dec, "	300 00
Do	Do	do J. C. Deaten	3 Dec., "	170 00
Note	E. Walker	J. D. Thomas, W. Haller	5-8 Dec., 1857	1,500 00
Do	do	N. Tensley Pate	30-3 " "	160 53
Do	do	Dudley & Johnson	1-4 " "	778 82
Do	do	J. D. Thomas, G. J. Apperson	3-6 " "	2,388 33
Do	do	Smith & Harwood	10-13 " "	248 34
Do	do	Alex'r Hill	5-8 " "	516 13
Do	do	Mark Downey	8-11 " "	264 46
Do	do	John A. Lacy	10-13 " "	698 39
Do	B. W. Green	E. Davenport & Co	17-20 " "	610 34
Do	E. Walker	J. H. Wickham, Va. C. R. R	24 " "	2,000 00
Do	do	B. W. Green	1-4 " "	3,500 00
Draft	E. Walker, W & K	J Stearns & Co	5-8 " "	4,310 59
Note	E. Walker	B. Pilcher	12-15 " "	300 00
Note	do	A. B. Hutcheson	13-16 " "	450 00
Note	B. W. Green	E. Walker, R. D. Philips	19-22 " "	283 00
Note	E. Walker	J. H. Wickham. E. D. & Co	14-17 Jan'y, 1858	4,000 00
Note	B. W. Green	Godden & Apperson	6-9 " "	237 54

SCHEDULE B.—Continued.

	Note or draft.	Drawer.	Endorser.	When due.	Amount.
	Note	E. Walker	J. D. Thomas, S. J. Sullivan	25-28 " " ..	1,200 00
120	Note	E. Walker	J. H. Wickham, Va. C. R. R	24 Jan'y, 1858..	4,000 00
	Note	E. Walker	R. Blankenship	21-24 " " ..	642 27
	Note	B. W. Green	E. Walker, Ja's Philips	10-13 " " ..	2,000 00
	Note	do	do. do.	10-13 " " ..	214 20
	Note	E. Walker	B. W. Green, Davis & Co	23-26 " " ..	588 50
	Note	B. W. Green	J. F. White	14-17 " " ..	175 00
	Note	B. W. Green	E. Walker	15-18 " " ..	600 00
	Note	E. Walker	Cornelius Crew	7-10 " " ..	1,000 00
					74,843 50
	Note	E. Walker	B. W. G., E. Davenport & Co.	18-21 " " ..	2,084 00
	Draft	S. C. Piper, on E. W		5-8 " " ..	600 00
	Do	N. Wheat, on E. W		20-1 " " ..	520 00
	Do	E. Walker, on W. & K	E. D. & Co	22-25 " " ..	2,000 00
	Note	E. Walker	J. H. Wickham, Ja's Allen	5-8 Feb'y, 1858..	2,000 00
	Draft	B. W. G., on E. Walker	Clark & Cobin	1 Mar., " ..	2,657 70
	Note	E. Walker	J. D. Thomas, E. T. W. & Co	8-11 " " ..	2,050 00
	Note	do	B. S. Danbridge	16-19 " " ..	925 00
	Draft	E. Walker, on W. & K	J. Stearns & Co	4-7 Sep., 1857..	2,000 00
	Do	do	do.	5-8 " " ..	5,000 00
	Note	B. W. Green	W. W. Parker	24-27 Oct., " ..	175 00
	Note	do	A. B. Hutchinson	6-9 Dec., " ..	625 00
	Draft	do., on E. W	V. Willett	9-12 " " ..	800 00
	Note	E. Walker	B. W. G., D. Philips	12-15 Feb'y, 1858..	250 00
121	Note	E. Walker	C. Gennett	14-17 Feb'y, 1858..	330 00
	Note	E. Walker	Jno. A. Lacy	14-17 " " ..	480 15
	Note	E. Walker	B. W. G., B. S. Dandridge	22-25 Mar., " ..	425 00
	Note	B. W. Green	G. & Apperson	12-15 July, " ..	244 46
	Note	E. Walker	E. Davenport & Co	25-28 " " ..	5,000 00
	Draft	S. Steers, on W. & K	J. Steers & Co	28-31 Jan'y, 1858..	2,400 00
	Note	Edmund Winston			4,000 00
	Debt to W. B. Rogers, evidenced by def't. acceptance of E. Walker			Oct., '57 & Jan'y, '58	14,172 85
	Debt to James M. Miller, evidenced by E. Walker's acceptance			Dec., 1857	9,500 00
	Debt to Alex. S. Miller, by E. Walker's title			Jan'y, 1858	7,200 00
	Debt to B. F. Rogers, by E. Walker's acceptances			Nov. & Dec., 1857.	5,920 43
	Debt to R. H. Lindsay, by E. Walker's acceptances			Dec., 1857	4,008 94
					150,212 03
	Debt to J. L. Thornton, by E. Walker's acceptance			Oct., 1857	2,463 21
	Debt to C. C. Rogers, by E. Walker's acceptance			Oct., 1857 & Jan'y, 1858	3,412 50
	Debt to W. J. Rogers, by E. Watkin's acceptance				1,337 50
	Debt to J. D. Wan, by E. Walker's bond				2,000 00
	Debt to Will. Way, by E. Walker's acceptance			14 Nov., 1857	1,647 79
	Debt to I. E. Shrapskin, by E. Walker's acceptance			21 Oct, "	1,548 96
	Debt to Geo. M. McClellan, by E. Walker's several acceptances				12,220 00
122	Debt to Edmund Davenport & Co., by due bill for borrowed money				500 00
"	" Edmund Davenport & Co., by bank check				2,500 00
"	" Isaacs & Taylor, by bank check				1,000 00
"	" Do. do.				2,000 00
"	" Godden & Apperson, several do				6,000 00

EDWIN WALKER.

SCHEDULE C.

List of debts due by Edwin Walker.

H. E. Showhan, debt due by acceptance of E. Walker's, due 14 Dec., 1857, for $1,697 85

D. debt by acceptance of E. Walker for 2,000 00

G. M. Parker, debt due by acceptance of E. Walker, due 5 Sept., 1857, for 3,812 64

W. M. Shave, debt due by 2 acceptances of E. Walker, due May & July, for 5,570 00

W. M. Shave, due-bill of E. Walker for 1,682 00

And other debts which may been omitted in Schedule B, and in this schedule, and due by Edwin Walker.

EDWIN WALKER.

(Recorder's seal and certificate on back.)

123 At the execution of the annexed commission issued out of the supreme court of the District of Columbia, and to us directed, and empowering us to examine evidences in the cause depending in said court between Godden, Apperson, et al., as plaintiffs, and M. A. S. Kimmell et al, as defendants, we, Edgar M. Garnett and Robert D. Ward, commissioners therein named, having met on the twelfth day of December, A. D. 1871, at 10 o'clock, at No. 1004 Main street, in the city of Richmond, the same being appointed by us as the time and place for executing said commission, did proceed then and there to take the depositions of Isaac Davenport, j'r, & others.

ISAAC DAVENPORT, j'r, a witness of lawful age, produced on the part of the plaintiffs, being duly sworn and examined on the interrogatories herewith returned, deposes and says:

124 To the first interrogatory he answers: My name is Isaac Davenport, j'r. My age is fifty-seven years. My occupation, president of the First National Bank of Richmond.

To the second interrogatory he answers: I knew Edwin Walker for 20 years previous to his death, which occurred in 1870. He has resided in and near Richmond, Virginia, for the last twenty years. For many years prior to 1857 he was engaged in farming and in speculating largely in horses and mules, buying and selling the same.

To the third interrogatory he answers: I was a member of the firm of Edmond, Davenport & Co., composed of Robert Edmond, myself, and James H. Blair in October, 1857; and 10 years prior thereto we were doing a large grocery business, and also commission; we owned and operated a line of packet-boats that ran daily between Rich-
125 mond and Lynchburg, either going or coming, and we used a great many horses for drawing said boats. We had large transactions with said Walker, and loaned him at various times large sums of money. The firm of Davenport & Co. was dissolved in 1862.

To the fourth interrogatory he answers: On the 3d of April, 1865, in the great conflagration of Richmond, the house in which all my own papers were stored, and all the papers of Edmond, Davenport & Co. were also stored, was burned, and with it all the evidence of indebtedness of Edwin Walker, held by said firm, were destroyed except some acceptances of Walker and Kimmell, amounting, I believe, to some $4,000, upon which we were suing in Washington. Those acceptances I have requested my counsel to look up for the purpose of producing them, but I am informed by him that he cannot find them. They
126 were filed with the papers in those suits, and a trial had on them in Washington in 1859 or 1860, and the jury being unable to agree upon a verdict the suits were not decided. I have been told by my counsel that they were struck from the docket of the court during the progress of the war. I have made diligent search for the other evidences of indebtedness of Walker, held by said firm in 1857, in October of that year, and have not been able to find a single one of them, therefore I believe they have all been lost or burned. All the papers in my safe were totally consumed. I have a distinct recollection of rendering to Walker a statement of his indebtedness to said firm some time in the year 1863. The sum of that indebtednesss rendered to him was about $13,000. I believe Edwin Walker, and Walker and Kim-
127 mell owed the firm of Edmond, Davenport & Co., on the 8th day of October, 1857, $17,347.44; that he owed them in 1863, $13,000 or thereabouts, and he still owes them the said amount of $13,000, with interest; that no part of that sum has been paid by said Walker,

or anyone else for him, either to myself or to any other member of said firm, or to anyone authorized by us, or either of us, to receive the same. The two young men who lived with us in 1857, and who kept our books in part, David Edmond and David Lambert, are both dead. Walker & Kimmell's acceptances were, I think, *were* not embraced in that statement of $13,000, and Walker has not paid me any money since Oct. 8th, 1857.

To the fifth interrogatory he answers: I cannot give the exact date of said indebtedness. I have no papers in my possession which will
128 showd it. I recollect that we held in October, 1857, sundry notes, drafts, due-bills, and checks of Edwin Walker; they were mostly all of them, if not all, for money loaned by us to him or to B. W. Green. They were either all drawn or endorsed by Edwin Walker.

To the sixth interrogatory he answers: There being no papers we cannot find his indebtedness in his own handwriting to said firm.

To the seventh interrogatory he answers: There are no papers.

To the eighth interrogatory he answers: I knew that Edwin Walker had made and put on record in Washington a deed conveying his property and rights of property then to secure us said indebtedness, and also to secure a very large amount of indebtedness to other parties. My knowledge in regard to his indebtedness to others was general
129 but not specific. I never had in my possession the original deed from Walker to Willett, referred to in said interrogatories. I presume it is on file in the proper office of record in Washington. Walker has repeatedly told me of his owing many of the parties named in said papers in general connections about his matters. I remember I advised him in 1863 to go and pay off his creditors who would receive it with Confederate money.

To the ninth interrogatory he answers: I have just answered the ninth in what I have just said in answer to the eighth. I have also answered the tenth and eleventh interrogatory.

To the 12th interrogatory he answers: I brought suit against A. F. Kimmell on a part of said indebtedness in 1858 or 1859, and those suits were pending and undetermined when the war broke out and sus-
130 pended all civil proceedings. Soon after the close of the war I employed a counsel to enforce the heir of this trust deed referred to in ninth interrogatory, and he informed me he was negotiating with Walker about the matter some time before his death, trying to obtain from him a particular statement of accounts between him and Kimmell.

The answer to the 13th interrogatory: I know nothing of the property mentioned in said paper except what Walker has told me, and the information he gave me was only general. I have always understood it was in the possession of A. F. Kimmell, the partner of Walker. I have always regarded it as very valuable.

I. DAVENPORT, J'R.

JAMES H. BLAIR, a witness of lawful age, produced on the part
131 of the plaintiffs, being duly sworn and examined on the interrogatories herewith returned, deposes and says:

To the first interrogatory he answers: My names is James H. Blair; my age, 50 years; my occupation, a commission merchant.

To the second interrogatory he answers: I have known him since 1845 or 1850, and my acquaintance continued with him up to the date of his death. He resided here most of the time, but traveled about a good deal, and was engaged in trading in horses and mules.

To the third interrogatory he answers: I was engaged in the grocery and commission business prior to Oct'r, 1857, as one of the firm of Edmond, Davenport & Co. The names of the firm were Robert Edmond, Isaac Davenport, j'r, and James H. Blair. The said firm was dissolved about 1862 or 1863, except so far as settling up the old business.

132 To the fourth interrogatory he answers: All the papers and books except one ledger was burned in the fire of 3rd April, 1865, which is the memorandum which the firm of Edmond, Davenport & Co. saved.

To the fifth interrogatory he answers: I cannot give the date of the indebtedness, as the papers are destroyed, but the debts were due Edmond, Davenport & Co. for money advanced them on drafts and notes of other parties, and their own notes; papers all burnt.

To the sixth interrogatory he answers: I saw him sign part of the papers, but they are all destroyed.

To the seventh interrogatory he answers: The papers were destroyed.

To the eighth interrogatory he answers: I know nothing about any debts, other than my own, due from said Walker, and never

133 heard him say anything about any other debts to my recollection.

To the ninth interrogatory he answers: He his answer the same as to the eighth.

To the tenth interrogatory he answers: They were all destroyed in the fire in April, 1865.

To the eleventh interrogatory he answers: A very small part has been paid. I should say about $1,500 or $2,000 of the whole amount has been paid—of the original debt.

To the twelfth interrogatory he answers: We have brought suits in several instances, but so far have recovered nothing. M'r Davenport, one of the firm, generally attended to part of the business.

To the thirteenth interrogatory he answers: This is the first time I have ever seen Exhibit Z, and know nothing about it. And further this de*fendan*t saith not.

J. H. BLAIR.

134 EDMUND T. WINSTON, a witness of lawful age, produced on the part of the plaintiffs, being duly sworn and examined on the interrogatories herewith returned, deposes and says:

To all the interrogatories he answers: That I was acquainted with Edwin Walker, deceased. I knew him from about the year 1850 up to the time of his death. Said Walker's office was in Richmond, and his occupation horse and mule dealer. I was engaged in the grocery and commission business prior to October, 1857, under the firm and style of E. T. Winston & Co., composed of E. T. Winston and W'm M. Sutton. The firm dissolved about 1861 or 1862. I have no evidence of indebtedness now. I assigned my entire interest to W'm M. Sutton about the year 1861. My papers were burnt in 1865, and my impression is that

135 the debt was contracted in 1856 or '57. It was in drafts drawn on Kimmell & Co. by Edwin Walker, and made payable, to the best of my recollection, to B. W. Green. Being well acquainted with Edwin Walker's handwriting, I am satisfied the drafts were signed by him.

And further this deponent saith not.

E. T. WINSTON.

GEORGE D. PLEASANTS, a witness of lawful age, being produced on the part of the plaintiffs, being duly sworn and examined on the interrogatories herewith returned, deposes and says:

To the first interrogatory he answers: My name is George D. Pleasants; age, 46 years; residence, in Henrico County; occupation, a farmer.

To the second interrogatory he answers: I knew Edwin Walker from 1858 until the time of his death. I never knew where he resided.

136 To the 3d, 4th, 5th, 6th, 7th, & 8th interrogatories he answers: That he knoweth not.

To the ninth interrogatory he answers: That John A. Hutcherson died in January, 1871, and that the deponent qualified as his administrator. I know nothing about the deed of trust, but I found among the papers of John A. Hutcherson, deceased, a note for $1,100, payable to the order of, and endorsed by, A. B. Hucherson, filed herewith, and marked "Exhibit A," dated October 22d, 1860; and I also find mentioned in schedule of Walker's deed two notes due A. B. Hutcherson, one due the 13–16 of Dec'r, 1857, amounting to $450, and other due the 6–9 Dec'r, 1857, amounting to $625.00, and I infer the note herewith filed and marked "Exhibit A" is a consolidation and renewal of the two notes due said A. B. Hutcherson, and mentioned above. I never had any

137 conversation with said Walker in reference to any of these debts.

In answer to the other interrogatories he knoweth not and the deponent saith not.

GEO. D. PLEASANTS.

JAMES C. JOHNSON, a witness of lawful age, being produced on behalf of the plaintiffs, and being duly sworn, deposes and says:

To the first interrogatory he answers: My age is 51 years; my name is James C. Johnson; residence, Richmond, Va.; occupation, keeper of a livery stable.

To the second interrogatory he answers: I have been acquainted with Edwin Walker since 1848; he resided in Richmond, and dealt in horses and mules.

To the third interrogatory he answers: He was engaged, prior

138 to Oct'r, 1857, in trading in horses with Edwin Walker.

To the fourth interrogatory he answers: I file herewith two notes, marked "Exhibit B" and "Exhibit C," one dated January 8th, 1857, for $3,000, one dated May 25th, 1863, for $1,148.79. Edwin Walker now owes me $1,148.79. The note for $3,000 has been paid, and the note for $1,148.79 is a renewal of the first note, and the balance left unpaid.

To the fifth interrogatory he answers: I have answered this interrogatory in my answer to the fourth.

To the sixth interrogatory he answers: I am well acquainted with the handwriting of Edwin Walker and know the notes filed as Exhibits B and C to be signed by said Walker.

To the seventh interrogatory he answers: I have stated in answer before this that the notes were in the handwriting of said Walker.

139 To the eighth interrogatory he answers: I never saw the deed of trust before, but I have heard the said Walker say that he had given such a deed, and that he had thereby secured the debts of Edmond, Davenport & Co., R. Blankership, A. B. Hutcherson, and others whose names I have forgotten.

To the rest of the interrogatories he answers: I have answered in the foregoing. And further deponent saith not.

JAMES C. JOHNSON.

HUNTON H. MARSHALL, a witness of lawful age, being produced on the part of the plaintiffs, being by us duly sworn, deposes and says:

To all the interrogatories he answers: I do not know personally Edwin Walker. I remember that he was in some way connected in business with B. W. Green. Some time before the late war there was
140 in my hands a note for upwards of $1,600, either made by Green & Walker or made by Walker or Green, and endorsed by the other, which belonged to the estate of the late W'm D. Sims, whose adm't'r, or personal representative, was David S. Reed. I placed that note in the hands of Geo. W. Randolph for collection, then a practising attorney in this city, and I think he brought suit upon it. I know that he informed me by letter, or otherwise, that B. W. Green had made a deed for the benefit of his creditors, and he thought it best that they should accept its terms. I responded that he might conduct the matter as he thought most judicious. In a short time thereafter, in the year 1863 or 1864, I received from him a check for a little upwards of $1,100 in Confederate money, which I handed over to the administrator of Sims.
141 This is all I know about it. I have no papers in my possession relating to the transaction, and have spoken of amounts and dates according to the best of my recollection. I have no doubt that the Walker I refer to is the same person about whom the interrogatories are propounded. And further this deponent saith not.

H. H. MARSHALL.

JAMES C JOHNSON, recalled, states in explanation of his answer given to the fourth interrogatory, deposes and says:

The note for $3,000, marked Exhibit B, a portion of which was paid by me, Walker having paid the other part. I think Walker paid $2,000 of said note to the bank which held it, and I paid the other $1,000 and took up the note. Walker still owes me that balance on that trans-
142 action. That note was never secured in the deed. The note for $1,374.57, mentioned in the schedule to Walker's deed, was for money loaned Walker by me, and the note of $1,148.79, filed as Exhibit C, is a renewal of the balance of the $1,374.57 and interest that remained unpaid at the date of the note for $1,148.79, which balance is still due me. The note filed as Exhibit A, with the deposition of George D. Pleasants, is signed in the handwriting of Edwin Walker. My transactions with Walker during 1856 and 1857 were very large, and I am very familiar with his handwriting.

JAMES C. JOHNSON.

WILLIAM B. ISAACS, a witness of lawful age, produced on the part of the plaintiffs, being duly sworn, deposes and says:

143 In answer to first interrogatory, I say: My name is William Beyan Isaacs: residence, Richmond, V'a; age, 53 years; occupation, banker & broker.

In answer to the second interrogatory: I say that I knew Edwin Walker twenty years or more. He resided in and near Richmond up to day of his death, some time in 1870. He was, prior to October, 1857, engaged largely in farming, and buying and selling mules and horses.

In answer to third interrogatory: I say that in 1857 I was engaged in private banking with William F. Taylor; the name of the firm was Isaacs & Taylor. It was dissolved in 1861. M'r Taylor is now living here. He is the first auditor of the State.

In answer to fourth interrogatory: I say I cannot file now the two due-

bills of Edwin Walker named in his deed of trust, one for $1,000
144 and the other for $2,000, for the reason that I have mislaid them. I think I have seen them within the last five years, but I have examined a good many of my private papers, and cannot now find them. I will continue my examination, and if I can find them I will produce them. My papers got disarranged during the fire of 1865, and I have not taken the time since to fix them up.

In answer to fifth interrogatory: I say that said indebtedness was for borrowed money. It was, and still is, due to the late firm of Isaacs & Taylor.

In answer to sixth and seventh interrogatories: I say I see no papers filed.

In answer to eighth interrogatory: I say I know nothing about said trust deed. He never gave me any specific information about the debts he owed to other parties.

145 In answer to ninth interrogatory: I say that I have already answered it in my last answer to eighth interrogatory.

In answer to tenth interrogatory: I have already said I cannot find the due-bills referred to. They are lost or mislaid.

In answer to eleventh interrogatory: I say that no part of said three thousand dollars has been paid to me or any agent of mine, or to M'r Taylor or any agent of his. The whole is still due with interest.

In answer to twelfth interrogatory: I say that in 1859 I sued Kimmell & Walker on their acceptance for about $2,500, and that suit was undetermined when the war broke out, and stopped all civil proceeding. Soon after the close of the war I employed counsel to prosecute
146 the suit, and he delayed some time in suing, because, as he informed me, he was trying to see if he could not get Walker, during his lifetime, to unite with us in suing Kimmell's estate for a settlement of the accounts between them. Besides, for two or three years after the war, it was a matter of doubt whether we should be allowed to sue in the courts of Washington without having first taken what is called the iron-clad oath.

In answer to the thirteenth interrogatory: I say that I know very little about the property mentioned in said deed. I think it was in the possession of A. F. Kimmell at the date of the execution of the deed referred to. Kimmell and his heirs, I believe, has been in possession of the real estate since.

And further this deponent saith not.

W. B. ISAACS.

147 FRANCIS H. DEANE, j'r, a witness of lawful age, being duly sworn, deposes and says for the plaintiffs:

In answer to the several interrogatories propounded in this cause, I say: I am the son of F. H. Deane, M. D., the person noticed in the deed of Edwin Walker to Voltaire Willett, referred to in these interrogatories. I know my father sold a house to B. W. Green, and took in payment for the same the note of said Green and Edwin Walker for $300. That note, I believe, has never been paid. My father, during his lifetime, frequently spoke in my presence of having lost his house. I am the administrator of my father's estate. I find no credit given on any of his books of account either to Green or Walker for having paid said note. I have made search among my father's papers for this note, but
148 cannot find it. I presume it was deposited by my father in bank for collection, and never withdrawn, but burned when the banks

of this city were all destroyed by fire on the 3d of April, 1865. I do not believe said note was ever paid to my father during his lifetime, and certainly never paid to me since his death.

F. H. DEANE, J'R.

There being no other witnesses to examine, the commissioners closed the said commission, and herewith return the same, signed by said witnesses, under their hands and seals, this 12th day of December, A. D. 1871.

[SEAL.] E. M. GARNETT.
[SEAL.] ROBERT D. WARD.

149 *Exhibit A.*

$1,100.] RICHMOND, *Oct. 27th*, 1850.

Sixty days after date I promise to pay to Alex. B. Hutcheson, or order, without offset, eleven hundred $\frac{00}{100}$ dollars, negotiable and payable at Bank of Virginia, value received.

EDWIN WALKER.

(On back:) Alex. B. Hutcheson.

Exhibit B.

$3,000.] RICHMOND, *Jan'y* 8, 1857.

Thirty days after date I promise to pay to John M. Fergusson, or order, without offset, three thousand dollars, negotiable and payable at Bank of Virginia, value received.

EDWIN WALKER.

(On back:) Jno. M. Fergusson.

Exhibit C.

$1,148.79.] RICHMOND, *May 25th*, 1863.

Four months after date I promise to pay to B. W. Green, or order, without offset, negotiable and payable at the Bank of Virginia, eleven hundred and forty-eight $\frac{79}{100}$ dollars, value received.

EDWIN WALKER.

(On back:) B. W. Green, James C. Johnson.

150 *Order extending time to take testim'y.—Filed Oct. 26, 1872.*

In the supreme court of the District of Columbia. Equity.

GODDEN ET AL. *vs.* KIMMELL ET AL. } No. 2267. Doc. 10.

It is this 26th day of October, A. D. 1872, ordered by the court that the time for taking testimony on both sides be extended thirty days from the date of this order, and that Robert G. Wood and Turner Atkinson, esqs., of the city of Richmond, in the State of Virginia, be and are hereby appointed commissioners to take said testimony in the city of Richmond, and John Cruikshank, of Washington, D. C., be and he is hereby appointed to take such testimony in the said city of Wash-

ington. And it is hereby ordered that said testimony be taken without written interrogatories. Consented to.

By the court.

A. WYLIE.

RICHARD L. WALLACH,
Sol'r for Def't Walker.
JNO. F. HANNA,
Of Counsel for Compl'ts.

151 *Order of reference to auditor.—Filed Apr.* 1, 1873.

In the supreme court of the District of Columbia.

GODDEN, APPERSON, ET AL.
vs.
KIMMELL ET AL.
} No. 2267. Eq. doc. 10.

By consent of counsel for all the parties it is this first day of April, A. D. 1873, ordered, adjudged, and decreed that this cause be and the same is hereby referred to the auditor—

1. With instructions to ascertain and state what amount or amounts are due to the complainants, and to whom of the complainants under the deed of trust between Edwin Walker and Voltaire Willett, mentioned in the bill of complaint as recorded in liber J. A. S. No. 58, folio 248, of the land records for the District of Columbia. And, if anything be found so due, then

152 2. Further to ascertain and state the partnership accounts of the said Walker and Abram Kimmell (being the firm of Walker and Kimmell named in the said bill), setting forth the character and amount of the property belonging to said partnership at the date of the execution of the deed of trust aforesaid, the disposition made thereof, the rents and profits received therefrom by the defendants;

3. Further to ascertain and state all the remaining assets of the said partnership, the value thereof, and how much consists of property embraced in the aforesaid deed of trust.

By the court.

A. WYLIE.

We consent to the above.

JNO. F. HANNA,
WALTER S. COX,
Of Counsel for Complainants.
JNO. D. McPHERSON,
Sol'r for the Def'd'ts Kimmell.
W. D. DAVIDGE,
Sol'r for the Def'd't Parris Walker.
RICHARD L. WALLACH,
Sol'r for Walker.

153 *Precipe for witness.—Filed Apr.* 24, 1873.

In the supreme court of the District of Columbia.

GODDEN ET AL.
vs.
KIMMELL ET AL.
} No. 2267. Eq. doc. 10.

Please issue a subpœna for Mrs. Mary A. S. Kimmell, administratrix

of Abraham F. Kimmell, deceased, to appear and produce before the auditor, on Tuesday morning next, at eleven o'cl'k, all books of account of the firm of Walker & Kimmell.

W. D. DAVIDGE,
Sol'r for Walker, def't.

APRIL 23, '73.

Subpœna duces tecum.—Issued Ap'l 24, 1873.

Supreme court of the District of Columbia, the 24 day of April, 1873.

GODDEN ET AL. *vs.* KIMMELL ET AL. } No. 2267. Eq. docket, 10.

154 The President of the United States to Mrs. Mary A. L. Kimmell, adm'x:

You are hereby commanded to appear, as witness in the above cause, before R. Leech, auditor, on the 29th day of April, 1873, at 11 o'clock m., and bring with you all books of account of the firm of Walker & Kimmell.

Witness: D. K. Cartter, chief justice, &c.

[SEAL.]

R. J. MEIGS, *Clerk*, &c.,
By L. P. WILLIAMS,
Ass't Clerk, &c.,

Marshal's return.

Sum'd.

A. SHARP, *Marshal.*

APRIL 25TH, '73.

Petition of A. G. Walker to be made a party defendant.—Filed June, 1874.

In the supreme court of the District of Columbia.

GODDEN AND APPERSON ET AL. *vs.* MARY A. S. KIMMELL ET AL. } No. 2267. Eq. doc. 10.

To the supreme court of the District of Columbia:

155 The petitioner, A. G. Walker, respectfully shows that he is an heir at law in common with Parris Walker, a defendant in the above entitled cause, of Edwin Walker, deceased, and as such entitled to be impleaded and heard against the relief prayed by the complainants in their bill in said cause, as will fully appear by said bill, to which your petitioner prays leave to refer. Your petitioner therefore prays that the complainants may be required to make him a party defendant to said bill, and that your petitioner may be allowed to defend against said bill, and as in duty, &c.

W. D. DAVIDGE,
For Pet'r.

Ordered, this 17th day of June, 1874, that a copy of the foregoing petition be served on the solicitor of the complainants, and before the

20th inst., and that the complainants show cause on or before first day of next term why the prayer of the petition should not be granted.

By the court.

A. W.

Not served. Marshal's fees not paid.

A. SHARP, *Marshal.*

OCT. 14TH, '74.

156 *Auditor's report.—Filed Jan.* 6, 1875.

In the supreme court of the District of Columbia. In equity.

WELLINGTON GODDEN ET AL. vs. MARY A. S. KIMMELL ET AL. } No. 2267. Docket 10.

By consent of the counsel for all the parties this cause has been referred to the auditor, with the following instructions:

"To ascertain and state what amount or amounts are due to the complainants, and to whom of the complainants, under the deed of trust between Edwin Walker and Voltaire Willett, mentioned in the bill of complaint as recorded in liber J. A. S. No. 58, folio 248, one of the land records for the District of Columbia, and if anything be found so due then further to ascertain and state the partnership accounts
157 of the said Walker and Abram Kimmell (being the firm of Walker & Kimmell named in the said bill), setting forth the character and amount of the property belonging to said partnership at the date of the execution of the deed of trust aforesaid, the disposition made thereof, the rents and profits received therefrom by the defendants; and further to ascertain and state all the remaining assets of the said partnership, the value thereof, and how much consists of property embraced in the aforesaid deed of trust."

Before proceeding to comply, as far as I am enabled to do so, with the directions contained in the foregoing order, I desire to state to the court that the proceedings in this cause are involved in such obscurity, and the testimony is so incomplete, vague, and indefinite, that it seems difficult, if not impossible, for me to arrive at any very satisfactory conclusions.

158 Prior to the passage of the said order of reference, testimony was taken in the cause on behalf of the complainants, under a commission issued by this court November 29, 1871, to Robert D. Wood and Edgar M. Garnett, of Richmond, Virginia; and on the 16th day of May, 1872, additional testimony for the complainants was taken by John Cruikshank, an examiner in chancery of this court, all of which testimony is filed in the cause and has been considered by me. In pursuance of said order I have taken the testimony of five witnesses for the complainants, being all who were produced before me, whose depositions are attached to this report.

The deed of trust referred to between Edwin Walker and Voltaire Willett was executed on the 8th day of October, 1857, and recorded July 22, 1858. To this deed are attached two schedules,
159 one marked "B," purporting to be a "list of drafts, notes, and bonds due by Edmund Walker," and the other marked "C," purporting to be a "list of debts due by Edwin Walker." The deed recites among other things that "whereas Edwin Walker, independently of his indebtedness as a member of the firm of Walker and Kimmell, is in-

debted in a large amount to persons named in schedules B and C, and after paying all of the debts of the firm of Walker and Kimmell desires to convey his interest in the firm of Walker and Kimmell in trust to secure pro rata the debts in schedule B, and after paying off the debts in schedule B in full, if sufficient therefor, to secure the debts in schedule C pro rata, and if sufficient to pay off schedule C in full to discharge them in full." The grantor then pro-
160 ceeds to convey to the said trustee, "Voltaire Willett, his heirs, executors, administrators, and assigns forever, all of his, the said Edwin Walker's, right, title, and interest in and to the real and personal property, debts, effects, credits, and assets of every kind whatever and in any manner belonging to the firm of Walker and Kimmell, but subject to the debts and liabilities due from said firm and to the rights of said Kimmell in winding up and paying off the same; the true intent and meaning of this deed being only to convey whatever interest said Walker may be entitled to after all of the liabilities of Walker and Kimmell have been paid off and discharged."

I am directed by the order "to ascertain and state what
161 amount or amounts are due to the complainants, and to whom of the complainants, under the said deed of trust."

In the bill the complainants do not set forth their claims with particularity and precision. They allege in the second paragraph "that the said Walker, being indebted as aforesaid to the complainants, their testators and intestates, as well as to other parties, to a great amount, dissolved partnership with said Kimmell" and executed the said deed of trust.

The defendants, Mary A. S. Kimmell and A. J. Kimmell, in the twelfth paragraph of their answer say:

"These defendants are informed and believe and upon such information and belief deny that the plaintiffs are unpaid creditors of the said E. Walker, but charge the fact to be that they have been paid in
162 full; and they say, upon information and belief, that some years prior to the year 1857, to wit, in the year 1848, the said E. Walker left Washington and went to Richmond, Virginia, where he engaged in business with one Benj. W. Green, and there incurred large debts, for which the said B. W. Green was jointly liable, including those debts mentioned in the schedule to the deed of Oct. 8, 1857, the payment of which the complainants in this cause seek to enforce; that in the latter part of the year 1857 the said E. Walker, at Richmond, made a deed conveying to the said Green a large amount of real and personal property for the satisfaction of said debts, and the said Green accepted the same and assumed and undertook to pay all the said debts, including these now set up in the bill of complaint, and to indemnify and
163 save harmless the said E. Walker against the same; and that afterward the said Green or said Walker, or both, did satisfy and extinguish all the said debts either by payment in money or by giving other securities, which were accepted in full satisfaction for said debts."

None of the obligations or evidences of indebtedness named in the said schedule B and C have been submitted to me. No draft, note, bond, or other evidence of debt corresponding with any of those described in either of the said schedules has been produced, and there is no proof that they or either of them are now held by any of the complainants. Indeed, from the manner in which the schedules are made up, it is impossible to determine to what particular person named
164 therein the said drafts, notes, and bonds were originally payable, with a few exceptions.

But James C. Johnson, who is one of the complainants, when testifying before the commissioners at Richmond, Virginia, produced a promissory note of Edwin Walker, which is attached as Exhibit C to his deposition dated Richmond, May 25, 1863, for the sum of $1,148.79, payable four months after date to the order of B. W. Green, by whom it is endorsed. Respecting this note Johnson testifies as follows:

"The note for $1,374.57 mentioned in the schedule to Walker's deed was for money loaned Walker by me, and the note of $1,148.79 filed as Exhibit C is a renewal of the balance of the $1,374.57 and interest that remained unpaid at the date of the note for $1,148.79, which balance is still due me."

165 Johnson's testimony before me, as will be seen by reference to his deposition, is substantially the same as the above.

This note for $1,148.79 comes, perhaps, within the rules, that a mortgage made to secure a promissory note will remain security for any new note given in payment of the former one, unless there is an intention to the contrary. (See 1 Hilliard on Mortgages, 477, and authorities there cited.)

The amount due on said note, principal and interest, at the date of this report is $1,944.25.

This is the only instance in which the amount due to any of the complainants and to which one of them under the said deed of trust has been proven with any reasonable degree of certainty.

166 I am unable, therefore, as will readily be seen, to state what amount or amounts are due to the complainants, and to whom of the complainants, with the exception above named—if that be an exception—under the said deed of trust.

The order further directs me to "ascertain and state the partnership accounts of the said Walker and Abram Kimmell, being the firm of Walker & Kimmell, named in the said bill."

No testimony or other material has been presented to enable me to state the said partnership accounts.

The "character and amount" of the real property belonging to said partnership at the date of the execution of the deed of trust aforesaid are set forth in the deeds introduced in evidence by the complain-

167 ants before Examiner Cruikshank, and marked "Exhibits 1, 2, 3, & 4." There is no evidence to show what personal property belonged to the said partnership at the date mentioned; nor is there any proof as to what disposition was made of the partnership property, either real or personal, except as hereinafter stated.

In the said deed of trust were embraced lot numbered sixteen, a part of lot numbered seventeen, and the west half of lot numbered eighteen, in square numbered four hundred and ninety-one, in the city of Washington.

By deed bearing date November 16, 1858, and recorded April 26, 1859, the said Kimmell and wife, and the said Voltaire Willett, united in a deed, whereby the said west half of lot eighteen, and part of lot

168 seventeen, were conveyed to Kellellum H. Lambell, trustee of the separate estate of Elizabeth E. Foulkes, for the consideration of five thousand dollars. This deed refers to the aforesaid deed of trust and mentions the purposes for which it was executed, and then recites that "whereas the said firm (of Walker & Kimmell) was and is indebted to M'r's Elizabeth E. Foulkes in the sum of two thousand dollars, together with interest thereon at the rate of six per centum per annum, from the sixteenth day of November, in the year eighteen hundred and fifty-three, being for so much money of the separate estate of the said

M'r's Elizabeth E. Foulkes, then loaned and advanced to the said firm; and the said Kimmel, for the payment of the said debt and interest, and for the purpose of winding up and paying off the debts
169 of the said dissolved partnership, and ascertaining and paying over to the said Voltaire Willett, to be applied by him according to the subsequent trust of the said deed, the amount, if any, which may be found due to the said Walker, hath agreed to sell to the said M'r's Elizabeth E. Foulkes the said lots and parcels of ground, in consideration of the sum of five thousand dollars, which sum is to be paid at the delivery of these presents by the satisfaction of the aforesaid debt and interest, and the balance at the same time to be paid or secured to the satisfaction of the said Kimmell."

By deed dated the 19th day of February, 1864, and recorded April 28, 1868, the said Elizabeth C. Foulkes and her trustee, Kellellum H.
170 Lambell, reconveyed the said pieces of real estate to the said Abraham F. Kimmell for the consideration of five dollars.

The complainants charge in their bill that said conveyance was procured by said Kimmell fraudulently, in order to have the property reconveyed to himself individually. (Paragraph 5.)

The defendants Kimmell, in their answer, deny all fraud and bad faith in the premises. (Paragraph 9.)

And there is no testimony whatever touching this conveyance.

Whilst the circumstances attending the conveyance referred to may be well calculated to cast suspicion upon it, I find nothing to warrant me in pronouncing it fraudulent and void. But this is a question for the court.

The only testimony we have respecting the rents and profits
171 received by the defendants is contained in the deposition of Amman Green, hereto attached. The average annual rental value of the entire property, as estimated by him, is $1,328.00; but excluding the property charged to have been fraudulently conveyed, it is only $938.00.

All the remaining assets of the said partnership, so far as is shown by the evidence, consists of the real estate described in the deeds marked Exhibits 1, 2, 3, and 4, to the testimony taken by examiner Cruikshank, to which reference has already been made. This, however, includes the pieces of property claimed by the plaintiffs to have been fraudulently conveyed. If they are excluded, the remaining assets will consist of lot sixteen, in square four hundred and ninety-one, with the improvements thereon.

172 The value of the remaining assets of the said partnership nowhere appears in evidence. They all consist of property embraced in the aforesaid deed of trust.

I deem it proper for me to add that it appears by the testimony that on the 3rd of April, 1865, a great fire occurred in the city of Richmond, Virginia, whereby certain of the books and papers belonging to the firm of Edmund, Davenport & Co. and others of the complainants were lost and destroyed.

December 10, 1874.

R. LEECH, *Auditor.*

173 In the supreme court of the District of Columbia. In equity.

GODDEN ET AL. *vs.* KIMMELL ET AL. } No. 2267. Docket 10.

By virtue of an order of reference in this cause, dated the 1st day of

April, 1873, I appoint Monday, April 14, 1873, at 10 o'clock a. m. of that day, at my office in Barbour's Law Building, No. 490 Louisiana avenue, Washington City, to consider the matters referred; at which time and place you are notified to attend.

R. LEECH, *Auditor.*

To JOHN D. MCPHERSON, Esq.,
Sol. for Def'ts Kimmell.
APRIL 8, 1873.

I do hereby acknowledge service of the above notice, this 8th day of April, 1873.

J. D. MCPHERSON,
P. R. U. M.

174 In the supreme court of the District of Columbia. In equity.

GODDEN ET AL.
vs.
KIMMELL ET AL. } No. 2267. Docket 10.

By virtue of an order of reference in this cause, dated the 1st day of April, 1873, I appoint Monday, April 14, 1873, at 10 o'clock a. m. of that day, at my office in Barbour's Law Building, No. 490 Louisiana avenue, Washington City, to consider the matters referred; at which time and place you are notified to attend.

R. LEECH, *Auditor.*

To RICHARD L. WALLACH, Esq.,
Sol. for Def't Parris Walker.
APRIL 8, 1873.

I do hereby acknowledge service of the above notice this 8th day of April, 1873.

RICHARD L. WALLACH,
Sol. for Walker, Def'd't.

175 In the supreme court of the District of Columbia. In equity.

GODDEN ET AL.
vs.
KIMMELL ET AL. } No. 2267. Docket 10.

By virtue of an order of reference in this cause, dated the 1st day of April, 1873, I appoint Monday, April 14, 1873, at 10 o'clock a. m. of that day, at my office, in Barbour's Law Building, No. 490, Louisiana avenue, Washington City, to consider the matters referred; at which time and place you are notified to attend.

R. LEECH,
Auditor.

To W. D. DAVIDGE, Esq.,
Sol. for Def't Parris Walker.
APRIL 8, 1873.

I do hereby acknowledge service of the above notice this 8th day of April, 1873.

W. D. DAVIDGE,
For Def't Walker, Adm'r.

176 In the supreme court of the District of Columbia. In equity.

GODDEN ET AL.
vs.
KIMMELL ET AL. } No. 2267. Docket 10.

Take notice that the hearing in the above-entitled cause has been adjourned until Wednesday, April 23, 1873, at 10 o'clock a. m., at my office in Barbour's Law Building.

R. LEECH,
Auditor.

APRIL 21, 1873.

J. D. MCPHERSON, Esq.,
Solicitor for Def'ts Kimmell.

Service acknowledged.

J. D. MCPHERSON,
For Def't Kimmell.

177 In the supreme court of the District of Columbia. In equity.

GODDEN ET AL.
vs.
KIMMELL ET AL. } No. 2267. Docket 10.

Take notice that on Tuesday, the 17th day of February, 1874, at the hour of 11 o'clock a. m. of said day, at my office, No. 486 Louisiana avenue, Washington City, I shall proceed to execute the order of this court passed on the 1st day of April, 1873, referring the above-entitled cause to the auditor.

R. LEECH,
Auditor.

JANUARY 19, 1874.

To W. D. Davidge, esq.; John D. McPherson, esq.; John Scott, j'r, esq.; John F. Hanna, esq.; W. S. Cox, esq.; R. L. Wallach, esq.

178 We do hereby acknowledge service of the above notice this 19th day of January, 1874.

JNO. D. MCPHERSON,
For Kimmell.
W. S. COX,
JOHN SCOTT,
Per JNO. F. HANNA.
JNO. F. HANNA,
For Complainants.
RICHARD L. WALLACH,
For Def't Walker.

Judge LEECH:

M'r Davidge has agreed to fix the time for the 17th February, 1874.

JNO. F. HANNA.

In the supreme court of the District of Columbia.

WELLINGTON GODDEN ET AL. }
vs. } No. 2267. Eq. doc. 10.
MARY A. S. KIMMELL ET AL. }

In pursuance of an order of reference in the above-entitled cause, bearing date the 1st day of April, 1873, and after due notice to the solicitors of the complainants and defendants, I proceeded, on the
179 14th day of April, 1873, at 10 o'clock a. m. of said day, at my office, to consider the matters directed to be inquired into by said order. I was attended by John F. Hanna and John Scott, j'r, esquires, who appeared as solicitors for such of the complainants as are specifically named in the bill of complaint, except Godden & Apperson and Hunton H. Marshall. I was also attended by Walter D. Davidge and Richard L. Wallach, esquires, solicitors for defendant Parris Walker. John D. McPherson, esq., solicitor for defendants Kimmell, was duly notified, but did not attend.

The solicitors for the said complainants introduced in evidence the deed of trust from Edwin Walker to Voltaire Willett, filed as an exhibit to complainants' bill and marked "Exhibit A."

The said last-named solicitors also offered in evidence certain
180 depositions marked "Exhibit B," taken on behalf of the complainants under a commission issued by the supreme court of the District of Columbia, November 29, 1871, to Robert D. Wood and Edward M. Garnett, of Richmond, Virginia. To the introduction in evidence of said depositions M'r Davidge objected on the grounds stated in the paper hereto annexed marked "C."

By agreement of counsel adjourned until Wednesday, April 23, 1873, at 10 o'clock a. m.

R. LEECH,
Auditor.

Depositions before auditor.

Depositions of witnessess produced, sworn, and examined in the above-entitled cause before the auditor on the 23d day of April, 1873, by adjournment.

Messrs. John F. Hanna and John Scott, j'r, appeared as solic-
181 itors for the complainants, and Messrs. Walter D. Davidge and Richard L. Wallach as solicitors for defendant Parris Walker.

M'r John D. McPherson, solicitor for defendants Kimmell, was notified, but did not attend.

JAMES C. JOHNSON, a witness of lawful age, being duly sworn, deposes and says:

Examined by M'r Scott:

My name is James C. Johnson; reside in Richmond, Virginia; age, 52 years; am engaged in the livery-stable business. I knew Edwin Walker since about 1848; Edwin Walker passed to me the note for $1,374.57 mentioned in the deed of trust about the years 1859 or 1860. I had a good many transactions with Walker, and received a good many notes from him; I can't recollect the exact date of this note.
182 1. Question. Look at the deed filed with this bill and marked "Exhibit A," and say what you know with regard to the note therein mentioned of the sum of $1,374.57, payable on the 9th of November, 1857, and generally all that relates to that note and the debt secured thereby.

Answer. This note was given by Walker, endorsed by B. W. Green, to me for borrowed money. When Walker made this deed he said he would put this note in. I judge he referred to the deed he made at Richmond. I did not know what deed; he said he was going to make a deed. This note was protested, and Walker renewed it several times. He paid me small sums on it from time to time, reducing it to about $1,170.

2. Question. Look at the note referred to as Exhibit C, and filed with the commission already offered in evidence in this cause by the
183 complainants, and say by whom it is signed, and whether or not it was a renewal in part for the sum above mentioned by you; and, if so, whether it remains unpaid or not?

(Objected to by counsel for Parris Walker, because leading. All the testimony of this witness relating to any transactions with or declarations by Edwin Walker is further objected to as incompetent.)

Answer. This is the note signed by Edwin Walker, and it is a renewal for part of the note already referred to, and has never been paid.

3. Question. Is it or not the last renewal?

(Objection renewed by counsel for Parris Walker.)

Answer. It is the last renewal.

4. Question. State if any part of the note first above mentioned
184 for $1,374.57 has been paid; and, if so, how much thereof, as well as you can recollect? I mean by payment something other than renewal by giving a new note.

(Objection renewed by solicitors for Parris Walker.)

Answer. He paid me some, I do not recollect how much, in wood, and was to pay me the balance in money, but did not do it.

Cross-examined by M'r Davidge:

1. Question. When you first loaned this money was not Walker in partnership with B. W. Green?

Answer. Walker and Green were doing business together; I judge they were in partnership.

2. Question. When did you first hear that Walker had made a deed of trust of property in this city to secure creditors?

185 Answer. It was about some three or four months before Walker's death.

3. Question. When did Walker die?

Answer. I think it was in 1871.

4. Question. What other deed or deeds had Walker made to secure creditors, as far as you know?

Answer. He told me he had made a deed. I took it for granted it was a deed he made in Richmond. I heard a good deal of talk about deeds, and I took it for granted that it was a deed he made in Richmond.

5. Question. What other deeds did you hear about, and when did you hear about them?

(Question objected to by counsel for complainants, on the grounds that it assumes that the witness has heard of other deeds, when none have been produced or shown to be in existence.)

Answer. There was a good deal of talk about the deeds.

186 6. Question. Did you never hear that B. W. Green had made a deed, or that Walker and Green had made a deed of property in Richmond?

(Objected to by counsel for complainants, on the ground that the testimony would be hearsay and incompetent.)

Answer. I may have heard it on the streets.

7. Question. State whether, to the best of your recollection, you did hear it?

(Objection repeated.)

Answer. I heard that Walker had made a deed.

8. Question. You are not answering my question. I have asked you whether you did not hear that Walker, or Walker and Green, had made a deed of property in Richmond, and when you heard it.

(Objection repeated.)

187 Answer. I heard that Walker made a deed, as I have already stated. I never heard that Walker and Green had made a deed.

9. Question. Did you ever hear that Green had made a deed; and, if so, when?

(Objection repeated.)

Answer. I may have heard that Green had made a deed, but I can't recollect when.

10. Question. About how long before Walker's death?

(Objection repeated.)

Answer. It may have been a year or two years.

11. Question. Did you ever apply for payment to the trustee under the Green deed?

(Objected to because it assumes the existence of a deed which has not been produced.)

Answer. I never did.

12. Question. Did you sign the following endorsement on a note
188 dated the 26th of June, 1860, made by Edwin Walker in favor of B. W. Green, and endorsed by him and yourself, to wit: "This note is a note given in renewal of a note of (1,375) thirteen hundred and seventy-five dollars, which was paid by E. Walker, and is described in the Ould deeds."

(Objected to by the solicitors for the complainants because it asks the witness to give the contents of a written instrument which is not produced.)

Answer. I never signed it. If I did it was in renewal of another note.

13. Question. What do you know about the Ould deed?

Answer. I do not know any more about it than what I have stated.

(Answer objected to so far as not responsive.)

14. Question. What have you stated about it?

Answer. I have stated there was a deed and a good deal of talk about a deed.

15. Question. Were your transactions with Edwin Walker very large during the years 1856 and 1857?

189 Answer. My transactions with him in 1856 were quite large; and probably in 1857. From 1850 up to 1857 I had large transactions with him.

16. Question. You did not renew this note dated May 25th, 1863, on the credit of the security afforded by the deed of trust shown you, did you?

Answer. This note was not renewed. It was the renewal of another note. When I took this note I had never seen any deed of trust, but Walker had told me there was a deed of trust, and that I was secured by it. Walker had told me that before 1863.

17. Question. Have you not testified in this cause that you first heard of this deed of trust some three or four months before Walker's death, and that he died in 1871?

(Objected to by solicitors for complainants, on the ground that
190 it refers to testimony that is illegal and incompetent.)

Answer. I testified in this cause in Richmond. I don't recollect the dates, and I don't recollect stating exactly the dates or times mentioned.

18. Question. I am not talking about what you testified to in Richmond. Have you not sworn here this morning that you never heard of the deed of trust until some three or four months before Walker's death, and that he died in 1871?

(Objection above repeated.)

Answer. I do not know that I said that. I may have said a short time, or three or four months. The deed of trust on Washington property, I mean to say, I did not hear of until three or four months before Walker died.

191 19. Question. What deed of trust was it that Walker told you before 1863 had been given?

(Objected to because it assumes the existence of a deed which has not been proved, and because it refers to incompetent evidence.)

Answer. He told me I was in a deed that he had made, but I did not know where the deed was. I took it for granted that it was in Richmond.

20. Question. Do you not keep an account of bills and notes receivable?

Answer. I generally keep an account, but all my account books were destroyed at the close of the war.

21. Question. Then you testify altogether from your unassisted memory?

Answer. I do.

22. Question. When did B. W. Green die?

Answer. He died last fall.

23. Question. Was the note dated May 25th, 1863, ever protested?

192 Answer. I think it was noted at my instance in bank for protest, but never protested.

24. Question. Why was it not protested?

Answer. The reason I did not protest it was because I thought I could protest it at any time before suit after having been noted.

Redirect, examined by M'r Scott:

1. Question. Read question No. 12, on cross-examination, and say if the note therein referred to has been paid in any other manner than by renewal of the same or part thereof.

(Question objected to by counsel for Parris Walker because leading.)

Answer. It never has been paid except by renewal.

2. Question repeated, the words "in any other manner than by renewal of the same or part thereof" omitted.

193 (Objection repeated.)

Answer. The note was never paid other than by renewal, as I stated before.

(Before the testimony of the witness was closed M'r Davidge interposed the defences of limitations and staleness of the demand of M'r Johnson.)

JAMES C. JOHNSON.

Sworn to and subscribed before me this 23d day of April, 1873.

R. LEECH,
Auditor.

ISAAC DAVENPORT, jr., a witness for the complainants, being duly sworn, deposes and says:

Examined by M'r Scott:

My name is Isaac Davenport, jr.; aged 59 years; president of the First National Bank of Richmond, by occupation; reside in Richmond, Virginia. I was a member of the late firm of Edmund, Daven-
194 port & Co., composed of Robert Edmond, Isaac Davenport, jr., and James H. Blair. The firm was dissolved in 1862 or 1863. All the members of the late firm survive. The firm consisted of Mess'rs Edmond and Davenport from 1841 until 1850, when Blair was taken in as a member, and after that the firm name was Edmond, Davenport & Co., until the date of its dissolution. I was acquainted with Edwin Walker for twenty or thirty years.

1. Question. Look at Exhibit A, filed with the bill, and state what you know with regard to the indebtedness of Edwin Walker therein mentioned to your late firm.

Answer. Our transactions with Walker & Green as partners, Edwin Walker, and Walker and Kimmell, and Isaac Steers & Co., of which firm Walker was a partner, were very considerable, amounting
195 probably to two millions of dollars. The fire in Richmond, of 1865, caused the loss of all our books and papers, except a ledger and journal. Our accounts were made up in 1861, I think, by M'r Blair, who kept the books and accounts of the firm, and among them was this account of Edwin Walker, for which he was indebted to us, either as drawer or endorser or in some other capacity, to the extent of about thirteen thousand dollars. Whether this includes the acceptances of Walker and Kimmell, amounting to about two or four thousand dollars—I think it was four thousand—I do not know. I have no recollection of anything being paid to the credit of either of these accounts. I attended the sale of Greens, in 1862, 1863, or 1864, above Richmond and made no purchases there.

196 (M'r Davidge desires here the objection to be entered that the witness, after the death of Walker, is incompetent to testify to any transactions with or declarations by said Walker. He further desires his objections to the claims of Davenport & Co., on the ground of limitations and staleness, to be entered.)

2. Question. State all you know about the indebtedness of Walker to your said firm and when it occurred, giving the amounts and dates as well as you can recollect.

Answer. It all occurred prior to the conclusion of the panic of 1857. I had business transactions with them after that time in the way of extensions, renewals, and payments.

3. Question. State whether the indebtedness of Edwin Walker to your firm, which occurred during and prior to 1857, has been paid or renewed; and, if so, how much has been paid; how much renewed,
197 as near as you can recollect.

(Objected to because leading.)

Answer. The account was reduced as I stated before to thirteen or seventeen thousand dollars, I am not certain which. The account was made up during the war, I think in 1862, and since that time if any part of it has been paid I do not know of it.

4. Question. Look at the deed of trust marked "Exhibit A," filed with the bill, and say what you know with regard to the property mentioned therein and in regard to its execution by Walker.

Answer. One basis of Walker's credit with us was his property in

Washington, mentioned by him very often. He spoke of the deed, but I did not pay much attention to it, as they were constantly mak-
198 ing deeds, changing firms, etc. I heard of this deed and others, but of the execution I know nothing.

5. Question. Was there or not a firm in Richmond, Virginia, during and prior to 1857, of the name and style of Isaacs & Taylor; and, if so, who were the members thereof?

Answer. William B. Isaacs and William F. Taylor constituted said firm in 1857, since dissolved. I also knew the firm of Godden & Apperson, composed of Wellington Godden and James L. Apperson, during and prior to 1857, which has since been dissolved. I knew the firm of E. T. Winston & Co., consisting of Edmund T. Winston, William M. Sutton during and prior to 1857.

6. Question. State, so far as you know, what means said firm has taken to collect the indebtedness against Walker above mentioned, and why the same has not been paid.

199 Answer. I declined to collect it during the war, and since I have not been able to collect. I mean during the latter part of the war.

Cross-examination by M'r Davidge:

1. Question. I understand that the transactions of Edwin Walker in various capacities with your firm were very heavy down to the panic of 1857. Will you give me an estimate as to the aggregate indebtedness at that time?

Answer. It is impossible for me to say, but I should not be surprised if it ranged from thirty to fifty thousand dollars. In this sum I include the general indebtedness of Edwin Walker, several as well as joint, and as drawer, endorser, and in every other capacity. It might have exceeded fifty thousand dollars.

200 2. Question. Are you able to divide into items this general indebtednes, stating how much was on individual and how much on partnership account?

Answer. I am not. It was all mixed.

3. Question. This aggregate amount I understand was from time to time reduced by payments, so that in 1861 or 1862, when the account was stated, it was either thirteen or seventeen thousand dollars, you cannot recollect which?

Answer. That is so. They as bona fide drawers or payers reduced this very little. I make this statement from pretty definite recollection.

4. Question. You cannot of course state what particular items which entered into the general indebtedness in 1857, were paid off, can you?

Answer. No, sir.

5. Question. You simply have a recollection that the general
201 balance against Walker on joint and several accounts, and in several capacities which in 1857 may have exceeded fifty thousand dollars, was reduced so that in 1861 or 1862 the general balance was about thirteen or seventeen thousand dollars?

Answer. Yes, sir: this balance was reduced largely by relieving Edwin Walker, Steers & Co., Green & Walker, as endorsers.

6. Question. You cannot, however, give me any definite idea of the extent to which the indebtedness was so reduced, can you?

Answer. No, sir.

7. Question. You do not then know to what extent the debts mentioned

in the schedule annexed to the deed of trust have been reduced by payments, do you?

Answer. No, sir; I think there has been nothing paid on them, but of course I do not know.

202 8. Question. Do you mean that there has been nothing paid since 1861 or 1862?

Answer. I do.

9. Question. Have you any definite recollection of the account as stated in 1861 or 1862, or only a recollection of about the aggregate balance?

Answer. Only about the aggregate balance.

10. Question. Then you cannot state whether any of the debts mentioned in the schedule annexed to the deed of trust were stated in the account made out in 1861 or 1862?

Answer. I imagine there were. Owing to the inability of collecting by law from either Green or Walker, and the debts specified being secured by a deed of trust, our efforts were principally made to collect debts on which they were the endorsers.

(The imaginings of the witness and his arguments objected to by M'r Davidge.)

203 11. Question. You have testified that you do not recollect the contents of the accounts as stated in 1861 or 1862, but only the general balance. Can you then state whether any of the debts mentioned in the schedule annexed to the deed of trust, and, if any, which was stated in that account?

Answer. I cannot at this time recollect the contents of that account. The Walker and Kimmell debt for about four thousand dollars which was in suit in Washington I can recollect. That is all I can recollect.

I. DAVENPORT, J'R.

Sworn to and subscribed before me this 23d day of April, 1873.

R. LEECH,
Auditor.

WILLIAM B. ISAACS, a witness for the complainants, being duly sworn, deposes and says:

204 Examined by M'r Scott:

My name is William B. Isaacs; age 55 years; reside in Richmond, Virginia; by occupation a banker; formerly a member of the firm of Isaacs & Taylor, which dissolved in 1861. The firm was composed of myself and William F. Taylor. We held the checks of Edwin Walker on the Exchange Bank of Virginia, in 1857, I think, respectively for the sums of one and two thousand dollars each. These checks have been mislaid, lost, or destroyed. Our office was broken into on the 3d of April, 1865, and the books and papers generally destroyed. I have searched for the checks above referred to diligently but without success. I am pretty sure that no part of those checks have been paid. The suit was not brought by reason of the difficulty of prosecuting any claim
205 against either Green or Walker. I did not attempt to collect any debts during the war. Since the war I regarded both Green and Walker as being insolvent.

Cross-examined by Mr. Davidge:

By the difficulty of prosecuting a claim against Green & Walker, I mean that they would go to all lengths and put their adversaries to every expense and trouble. A judgment obtained against them before the war, I think, could have been collected. I was inclined to think

that they were insolvent. They were men of property, but so covered up that it was hard to reach it. I first heard of this deed of trust on the Washington property about two years ago. In 1861, Green made a deed of trust on Virginia property conveying his whole estate in
206 Virginia. I did not know Voltaire Willett. I never corresponded with him, nor he with me. He never informed me as to this deed of trust on the Washington property. Until two or three years ago I did not know that we had any security by deed on this property in Washington. I do not know how I learned it.

WM B. ISAACS.

Before the testimony of the last-named witness was closed M'r Davidge interposed the defences of limitations and staleness to the demand of M'r Isaacs.

Sworn to and subscribed before me this 23d day of April, 1873.

R. LEECH,
Auditor.

Solicitors for complainants offered in evidence a certificate of the appointment of Francis H. Dean, j'r, as executor of Francis H. Dean,
207 deceased, marked "Exhibit D," and also papers introduced in evidence before Ja's Cruikshank, examiner in chancery, and by him marked Exhibits Pl'ff 1, 2, 3, 4, 5, and 6, filed in the cause, all subject to exceptions.

Adjourned until Tuesday, April 29, 1873, at 11 o'clock a. m.

R. LEECH,
Auditor.

The depositions taken under the commission are objected to:

1st. Because the commissioners failed to take any oath of office.

2d. They failed to give notice of the time and place of executing the commission.

3d. They failed to return the depositions as required by the commission.

4th. They failed to certify that the depositions were reduced to writing by one of them, and because in fact the depositions were not so reduced to writing.

5th. And for other reasons apparent on the face of the commission.

W. D. DAVIDGE.

APRIL 14, 1873.

208 TUESDAY, *April* 29, 1873.

Met pursuant to adjournment.

Present, John Scott, j'r, esq., solicitor for complainants, and Walter D. Davidge, esq., solicitor for defendant Parris Walker.

AMMAN GREEN, a witness of lawful age, being duly sworn, deposes and says:

My name is Amman Green; reside in Washington City; by occupation an auctioneer; to some extent I am familiar with the value of real estate in Washington and am competent to give an opinion as to the value thereof. I think I am acquainted with the property known as the Walker and Kimmell property, located on lots 16, 17, & 18 in square 491, fronting on C street in this city. I know on the west, at the corner of the alley, there is a large livery stable running east, built of brick; then there is a large three or four story brick house, formerly

209 known as the "Kimmell House," and formerly used as a hotel, and now by the police court; I think the next is a two-story brick house occupied by M'r's Kimmell, I think. That stable has been built upwards of twenty years. I think the stable ought to rent at twelve hundred dollars a year. The building occupied by the police court should rent for about a thousand dollars. The two other buildings would rent for about a thousand dollars. In 1858 I do not think the whole property would rent for more than two thousand or twenty-five hundred dollars. In the interval between 1858 and the present time, I think that a fair average rental would be about twenty-five hundred dollars.

A. GREEN.

Sworn to and subscribed before me this 29th day of April, 1873.

R. LEECH,
Auditor.

210 JOHN SCOTT, j'r., being duly sworn, deposes and says:

My name is John Scott, j'r; age 28 years; reside in the city of Baltimore; am an attorney and counsellor at law by profession; have been a practising lawyer for about six years. At or about the time of the institution of this suit I undertook to search for all evidences of indebtedness against Edwin Walker and Walker & Kimmell, and in pursuance of that purpose I examined the papers in the different cases instituted in this city against said parties or either of them. I also applied to such of the counsel in those cases as I had reason to think could give me information on the subject. The result of my investigations was that I was unable to learn of any notes, bills, or other evi-
211 dence of indebtedness as above mentioned, and I am convinced that such as were used in the said suits are lost or unattainable.

(The foregoing testimony is all objected to by M'r Davidge, and especially so much as undertakes to furnish the convictions of the witness.)

Cross-examined by M'r Davidge:

Question. Have you seen the counsel of Edmond, Davenport & Co.?

Answer. I have not seen the counsel of Edmond, Davenport & Co., but I have written to him requesting him to give me such information as he possesses on that subject, and have received no reply.

Question. How do you know that the counsel referred to has not some evidence of indebtedness?

Answer. It is impossible for me to have knowledge on that subject; I can but infer from the facts which are in my possession.

212 (The answer, so far as not responsive to the question, objected to.)

Question. How often have you been in this city in relation to this suit?

Answer. Between ten and twenty times.

Question. Then you have had abundant time to see M'r Kennedy?

Answer. Yes; I preferred to correspond with him.

Question. But as he did not answer your letter why did you not go to see him?

Answer. I concluded, of course, that if M'r Kennedy had any information on that subject he would have responded, having taken the precaution to address him at the requests of his clients, and so stated in my letter, and sent the same through a member of the bar of this city, who I presume is an acquaintance of his.

Question. When did you write to M'r Kennedy?

213 Answer. About a week since.

Question. Then your conviction that Kennedy has no evidence of indebtedness rests on the fact that although written to by you a week ago at the instance of his clients, as the letter expressed, and although the letter was delivered by a party who you presumed was acquainted with him, you have not received any reply to your letter?

Answer. Not altogether. Other sources of my deduction, and the principal ones, are the times at which the suits above referred to were brought, the fact that his clients have attempted for some time past to collect such evidence of debt without success, and the further fact that there are none on file in the cause.

Question. Now tell me whether you mean to be understood as asserting that any of the claims represented by you in this suit were ever before in litigation in this district?

214 Answer. So far as I know not a single one of the claims mentioned in the deed of trust filed in this cause were ever in suit in this district. I think the suits here were against Walker & Kimmell. I do not know whether they grew out of the claims represented by me in this case.

JOHN SCOTT, J'R.

Sworn to and subscribed before me this 29th day of April, 1873.

R. LEECH, *Auditor.*

M'r Scott, solicitor for complainants, here introduced in evidence, subject to exceptions, a paper purporting to be a copy of letters testamentary issued to James H. Gardner on estate of Alexander Hill, deceased, marked "Exhibit E," and also, subject to exceptions, paper purporting to be copy of letters testamentary issued to Peter J. Crew on estate of Cornelius Crew, deceased, marked "Exhibit F."

TUESDAY, *May* 6, 1873.

Met pursuant to adjournment.

Present, John Scott, j'r, solicitor for complainants, and Walter D. Davidge, solicitor for defendant, Parris Walker.

Adjourned until Tuesday, May 13, 1873, at 11 o'clock a. m.

215 *App'ntm't of F. H. Deane exec'r.—Exhibit D.*

STATE OF VIRGINIA,

City of Richmond, to wit:

Whereas Francis H. Deane, deceased, by his last will and testament, did make, constitute, and appoint Francis H. Deane, j'r, executor thereof; and at a circuit court, continued and held for the said city, before the judge of the said court, on the 9th day of February, 1870, the said last will and testament was proved according to law, and the said executor having performed what the laws of this commonwealth in that case require, certificate was granted him for obtaining a probate of the said will in due form; and whereas it is provided by the statute law of this commonwealth that the clerk of the court by which an order is made granting probates or letters of administration shall, when required by any personal representative, make out such probate or letters

216 in due form, which shall be signed by the clerk, sealed with the seal of the court, and attested by the judge of the court granting such probate or letters of administration:

Therefore I, Alfred Sheild, clerk of the said court, in pursuance of the law of the State of Virginia, do issue this probate, and do hereby authorize and empower the said Francis H. Deane, j'r, executor as aforesaid, well and truly to collect and administer all and singular the goods, chattels, and credits of the said Francis H. Deane, deceased, and also well and truly to administer the real estate within this commonwealth, which by the said will may be subject to his authority, in all matters and things concerning the same, according to the true intent and meaning of the said will and according to law, hereby requiring the said executor to make and exhibit into the said court a true and perfect inventory of the said goods, chattels, and credits, and also to make a just and true account of his actings and doings therein when thereto lawfully required.

Given under my hand and the seal of the said court this 5th day of January, 1872.

[SEAL.] ALFRED SHEILD, *Clk.*

Attest:

B. R. WELLFORD, J'R.
Judge Cir. C'r., Rich'd City, V'a.

217 *Exhibit E.*

STATE OF VIRGINIA,
City of Richmond, to wit:

Whereas Alexander Hill, deceased, by his last will and testament, did make, constitute, and appoint James H. Gardner the executor thereof; and at a circuit court continued and held for the said city, before the judge of the said court, on the 15th day of January, 1862, the said last will and testament was proved according to law, and the said executor, having performed what the laws of this commonwealth in that case require, certificate was granted him for obtaining a probate of the said will in due form; and whereas it is provided by the statute law of this commonwealth that the clerk of the court by which an order is made granting probates or letters of administration shall, when required by any personal representative, make out such probate or letters
218 in due form, which shall be signed by the clerk, sealed with the seal of the court, and attested by the judge of the court granting such probate or letters of administration:

Therefore I, Alfred Sheild, clerk of the said court, in pursuance of the law of the State of Virginia, do issue this probate, and do hereby authorize and empower the said James H. Gardner, executor as aforesaid, well and truly to collect and administer all and singular the goods, chattels, and credits of the said Alexander Hill, deceased, and also well and truly to administer the real estate within this commonwealth, which by the said will may be subject to his authority, in all matters and things concerning the same, according to the true intent and meaning of the said will and according to law, hereby requiring the said executor to make and exhibit into the said court a true and perfect
219 inventory of the said goods, chattels, and credits, and also to make a just and true account of his actings and doings therein when thereto lawfully required.

Given under my hand and the seal of the said court this 23d day of April, 1873.

[SEAL.] ALFRED SHIELD, *Clk.*

Attest:

B. R. WELLFORD, J'r.,
Judge Cir. C'r. Rich'd, V'a.

Exhibit F.

In Henrico County court, February 10th, 1865.

A writing purporting to be the last will and testament of Cornelius Crew, deceased, with a codicil annexed thereto, accompanied with a plan of lots drawn by Walter F. Pleasants, and referred to in the said codicil, was this day produced in court, severally proved by the oaths of J. H. Poindexter and Jno. H. Johnson, the subscribing witness'
220 thereto, and ordered to be recorded. And on the motion of Peter J. Crew, one of the executors in the said will named, and who made solemn affirmation thereto, and entered into and acknowledged a bond in the penalty of four hundred & forty thousand dollars, conditioned as the law directs, without security, it being directed in the said will that no security should be required of him, which bond is ordered to be recorded, certificate is granted him for obtaining a probat' of the said will in due form, liberty being reserved to the executrix named in the said will to join in the *bra*bat, when she shall think fit.

In testimony whereof that the above is a true copy, I have hereunto set my hand and affixed the seal of my said court, at the Court-House, this 21st day of April, A. D. 1873.

[SEAL.] G. BURTON, *C. H. C.*

221 *Exceptions to auditor's report.—Filed Feb.* 6, 1875.

In the supreme court of the District of Columbia.

GODDEN AND APPERSON ET AL. *vs.* KIMMELL ET AL. } No. 2267. Eq. doc. 10.

And now come the complainants, and through their solicitors, Walter S. Cox, John Scott, j'r, and John F. Hanna, file the following exceptions to the report of the auditor, filed in this cause January 6th, 1875, viz:

1. Because the auditor did not in said report state and report as liens against the property in said cause described the claims of Wellington Godden and James L. Apperson, late partners under the firm-name of Godden and Apperson, as said claims are stated in the schedule of the deed of trust, marked "Complainants' Exhibit A" to the bill of complaint.

222 2. Because the auditor did not in said report state and report as liens against the property in said cause described the claims of Robert Edmund, Isaac Davenport, j'r, and James H. Blair, late partners under the firm-name of Edmund, Davenport & Co., as said claims are stated in the schedule of the deed of trust, marked "Complainants' Exhibit A" to the bill of compaint.

3. Because the auditor did not in said report state and report as liens against the property in said cause described the claims of William M. Sutton and E. T. Winston, late partners under the firm-name of E. T. Winston & Co., as said claims are stated in the schedule of the deed of trust, marked "Complainants' Exhibit A" to the bill of complaint.

4. Because the auditor did not in said report state and report liens against the property in said cause described the claims of William B. Isaacs and William F. Taylor, late partners under the firm-name of Isaacs and Taylor, as said claims are stated in the schedule of the deed of trust, marked "Complainants' Exhibit A" to the bill of complaint.

5. Because the auditor did not in said report state and report as liens against the property in said cause described the claims of F. H.
223 Deane, j'r, administrator of F. H. Deane, deceased, as said claims are stated in the schedule of the deed of trust, marked "Complainants' Exhibit A" to the bill of complaint.

6. Because the auditor did not in said report state and report as liens against the property in said cause described the claims of Peter J. Crew, administrator of Cornelius Crew, deceased, as said claims are stated in the schedule of the deed of trust, marked "Complainants' Exhibit A" to the bill of complaint.

7. Because the auditor did not in said report state and report as liens against the property in said cause described the claims of John A. Hutcherson, administrator of A. B. Hutcherson, deceased, as said claims are stated in the schedule of the deed of trust, marked "Complainants' Exhibit A" to the bill of complaint.

8. Because the auditor did not in said report state and report
224 as liens against the property in said cause described the claims of James Gardiner, executor of Alexander Hill, deceased, as said claims are stated in the schedule of the deed of trust, marked "Complainants' Exhibit A" to the bill of complaint.

9. Because the auditor did not in said report state and report as liens against the property in said cause described the claims of Philip R. Winston, as said claims are stated in the schedule of the deed of trust, marked "Complainants' Exhibit A" to the bill of complaint.

10. Because the auditor did not in said report state and report as liens against the property in said cause described the claims of Hunter H. Marshall, as said claims are stated in the schedule of the deed of trust, marked "Complainants' Exhibit A" to the bill of complaint.

W. S. COX,
JOHN SCOTT, J'R,
JNO. F. HANNA,
Sol'rs for Compl'ts.

Feb'ry 6th '75.

225 *Order for reargument.—Filed May* 16, 1875.

In the supreme court of the District of Columbia.

GODDEN AND APPERSON, COMPL'TS, *vs.* KIMMELL AND OTHERS, DEF'TS. } No. 2267. Eq. doc. 10.

On motion of George F. Appleby, solicitor for the defendants Kimmell, it is, this 14th day of May, 1875, ordered that this cause, coming on to be heard on the auditor's report and the exceptions thereto, be reargued before the court at the next special term.

By the court.

A. W.

226 *Decree dismissing bill.—Filed Oct.* 11, 1875.

In the supreme court of the District of Columbia.

GODDEN & APPERSON ET AL. *vs.* KIMMELL ET AL. } No. 2267. Eq. doc. 10.

This case having been argued and submitted to Justice Wylie, and

having been duly considered, it is, this 11th day of October, 1875, ordered, adjudged, and decreed that the bill in this case be dismissed with costs.

By the court.

Appeal to gen'l term.—Filed Oct. 30, 1875.

In the supreme court of the District of Columbia.

GODDEN & APPERSON ET AL. *vs.* KIMMELL ET AL. } No. 2267. Eq. doc. 10.

The clerk will enter an appeal by the complainants, except
227 Wellington Godden and James L. Apperson, to the general term from the decree rendered in this cause at special term on October 11th, 1875.

W. S. COX,
JOHN F. HANNA,
JOHN SCOTT, J'R,
For Compl'ts, excepting James L Apperson & Wellington Goddin.

Decree in general term.—Filed June 12, 1876.

In the supreme court of the District of Columbia.

GODDEN & APPERSON ET AL. *vs.* KIMMELL ET AL. } No. 2267. Eq. doc. 10.

This cause came on to be heard upon the complainants' appeal from the decree in the special term dismissing the bill October 11th, 1875, and was argued by counsel; and thereupon, upon consideration
228 thereof, it is, this 12th day of June, 1876, ordered, adjudged, and decreed that the said decree in the special term be and the same is hereby affirmed with costs.

By order of the court.

Appeal to Sup. Court of the U. S.

And from this decree the complainants, by their solicitors, here now in open court pray an appeal to the Supreme Court of the United States, and the same is allowed.

By order of the court.

Clerk's certificate.

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 5th day of October, 1876.

[SEAL.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

(Indorsement on cover:) No. 211. Wellington Godden & James L. Apperson et al., appellants, vs. Mary A. S. Kimmell, adm'x of A. F. Kimmell, dec'd, William L. Kimmell et al. Dist. of Columbia sup. court. Filed 10th October, 1876.

Appic 4. 79 Asg. N. K. Wayne

In the Supreme Court of the United States

No. 211, October Term, 1878.

WELLINGTON GODDEN, et al.,
Appellants,

vs.

MARY A. S. KIMMELL, et al.,
Appellees.

Brief of Appellants on Motion to Dismiss the Appeal.

HANNA & JOHNSTON,
JOHN SCOTT,
For Appellants.

In the Supreme Court of the United States

No. 211, October Term, 1878.

WELLINGTON GODDEN, et al.,
Appellants,

vs.

MARY A. S. KIMMELL, et al.,
Appellees.

BRIEF OF APPELLANTS ON MOTION TO DISMISS THE APPEAL.

The motion to dismiss requires a brief statement of the facts of this case. A deed of trust was made by one of two tenants in common of certain real estate in Washington. He conveyed the property to the trustee, for the benefit of a number of creditors named in the schedule to the deed, and provided that after they were paid the surplus should be paid over to him. The trustee, therefore, united in himself all the interest of the creditors and grantor.

The trustee died, and certain of the creditors named filed a bill for the appointment of a new trustee, and a sale of the undivided interest so conveyed in behalf of themselves and of the other creditors secured in such deed, who will participate in the suit. The bill does not assert that the others have not been paid, and the respondents' answer expressly states that those debts have been discharged. This statement, as to all except the complainants, has not been controverted.

The property in question was bought for over $5,000 in 1842. It is proved to have been worth from $10,000 to $20,000 since 1857. Three of the complainants have claims over $2,500 in amount, one being over $13,000. The dividend which each will get cannot of course be ascertained before final distribution, as up to that time it cannot be certainly known how many will come in to share the fruits of the decree prayed for. The case was heard on bill, answers, replication and evidence, and the bill dismissed on the merits. This decree was affirmed by the Supreme Court of the District of Columbia. From the last decree this appeal has been pending for several years. The effect of the decree is to annul the debts of the complainants, and also to destroy the grantor's interest in this property.

We contend, in the first place, that three of the complainants have each claims in dispute over $2,500 in value; and secondly, the suit being for the appointment of a trustee and a sale by him, who will combine all interests, that the matter in dispute involves the entire interest in the property conveyed. We further insist that the statute of 1879 does not apply to appeals pending at the time of its passage.

The cases cited on appellees' brief (12 How. 360; 5 Wall. 210,) only determine that where the appellants have several and distinct claims under *several* and *distinct contracts*, and where their union in one suit is permitted by a Court of Equity for the sake of convenience only, the amount due to *each* appellant is the measure of the amount in controversy,

But, in the case at bar, appellants claim under a *single* contract, to wit: the deed of trust from Walker to Willet, trustee, (Record, pages 3, 4, 5 and 6); and the title to the property thereby transferred is claimed by them under that instrument.

It has been determined by this Court that where several creditors claim under a *single* contract, or unite by virtue of

a *single* title, the aggregate amount claimed by them, and not the amount claimed by each of them, is the measure of the amount in controversy.

In *Shields vs. Thomas*, 17 How. 3, a decree was obtained in the Chancery Court of Kentucky against the administrator of Goldsberry for a large sum. The appellees, *who were a portion of the representatives of Goldsberry*, united, in the U. S. Circuit Court for Iowa, in a bill to enforce said decree against said administrator, and prayed that the amount due each several distributee should be paid to him. It was contended, on motion to dismiss, that the sum due each claimant was the test of jurisdiction, and that, inasmuch as no one claim reached the minimum jurisdictional amount, the bill should be dismissed. Held, that the matter in controversy was the sum due to the distributees collectively; *that they all claimed under the same title;* that it was like a contract with several to pay a sum of money, though the money, when recovered, might be divided in equal or unequal proportions. The Court established the distinction between the case of several creditors, each of whom has a separate contract with the debtor, (as salvors or seamen,) and the case of several creditors claiming under a single contract.

In *Rodd vs. Heartt*, 17 Wall. 354, this distinction is applied to a suit by *several mortgagees secured* by a *single* mortgage; and this Court there held that, though no one of the claims exceeded $2,000, its jurisdiction could be maintained, because the aggregate sum due to all the appellants exceeded that amount.

It is also suggested that the value of the property claimed by appellants does not exceed $2,500. The record shows that lot 16 and the south part of lot 17, cost $5,000 in 1842, (record, page 17); that the west half of lot 18, cost $769.75 in 1844, (record, page 19); that, besides this, the value of the property has been enhanced by a certain easement, (record, page 21); and that the average annual rental value of lots 16, 17 and 18, from 1858 to 1873, would have been $2,500. (Record, pages 55, 56.)

One-half of the above property is claimed by appellants. This constitutes the fund in controversy, and is far in excess of $2,500, estimating its cost price as its true value. It has, no doubt, increased in value with the growth of the city.

The appellees seek to reduce each appellants' share in this fund below the jurisdictional amount, on the ground that the total scheduled debts amount to $186,000, and that the pro rata share of each scheduled creditor in said fund would be less than $2,500.

According to the authorities cited from 17 How. and 17 Wall., the sum claimed would still be above the minimum jurisdictional amount; but, in addition to this, the fatal error in appellees' calculation is, that the fund is distributed among *all* the creditors named in the schedules in said deed of trust.

The appellees have heretofore strenuously insisted that the scheduled debts have been paid, (record, page 9, par. 12,) so that they are estopped from claiming that any of them, except the amounts claimed by appellants, are properly payable from the fund in controversy.

The appellants have never claimed that all the scheduled debts are still subsisting.

Besides, the dismissal of the bill on the merits bars all of appellants' claim, and is an adjudication on the amount claimed by each. Three of these are confessedly over $2,500, and as to them the matter in dispute is over that amount.

Eacho vs. Cosby, 26 Grattan, Va., page .

II. Our next contention is, that the Act of 1879 has no application to this case. The fourth section, which limits the amount of the matter in controversy, as well as the rest of the act, is to be construed prospectively. It will then be read, "The final judgment or decree *hereafter rendered*," &c. On this subject the authorities speak with one voice.

"It is a universal rule that no statute will be construed to act retrospectively unless such a purpose be plainly expressed." 29 Md., bottom page 283.

"A statute ought not to have a retroactive operation, unless its words are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the Legislature could not be otherwise satisfied; and especially ought this rule to be adhered to when such a construction would alter the pre-existing situation of parties, or would affect or interfere with their antecedent rights." 38 Md. 531.

Mr. Sedgwick, in his work on the Construction of Statutory and Constitutional Law, on page 113, 2d Edition, states that the operation of the *general rule* is to give repealing statutes a very retroactive effect. In regard to criminal matters, (and we may add penal statutes,) he says this is unobjectionable. But in civil controversies, where parties have iucurred expense, and made arrangements on the faith of antecedent legislation, the case is far different. He then proceeds to state that the effect of this difference has been to engraft exceptions on the general rule; and on page 114 he sets down as one of the exceptions, a statute which modifies the remedies of the parties, "which shall be so construed as not to affect rights of action which have attached and become vested under the original law, and existing at the time of the repealing statute. "We are of the opinion," said Lord Denmon, C. J., in a case of this kind, "that the law, as it existed when the action was commenced, must decide the rights of the parties, unless the Legislature express a clear intention to vary the relation of litigant parties to each other.'"

Again on page 161, note *a*, the same author says the general rule is, that statutes are to be construed prospectively, for which he cites numerous authorities, and on page 162, in the same note, he states that remedial statutes are subject to the rule against retroactive operation.

In Potter's Dwarris, on page 162, note 9, "the American authorities are quite uniform on the retroactive effect of statutes." "*Although the words of the statute are broad enough in their literal extent to comprehend existing cases,* they must yet be construed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein." For this position he cites numerous cases.

This rule is moreover in accord with the decisions of this Court as we understand them. Statutes relating to criminal matters, under which head penal acts may be comprehended, are construed, perhaps, so as to operate as "a remission of the offense" by the offended party, viz: the government, on account of the leaning in favor of liberty. They are in the nature of a grant of pardon and freedom from the government to the individual, and are taken against the grantor when practicable. But in matters between individuals, both the reason and the rule are the other way. In such cases the inclination is not to disturb and unsettle and nullify proceedings, unless the act shows a plain intent to do so. In the McArdle case, (7 Wallace,) the words of the act, aimed confessedly at an existing appeal, prohibited appeals "*which may have been* or may hereafter be taken."

In the Insurance Co. vs. Ritchie, 5 Wallace, 544, the Chief Justice held that the act not only repealed, in express terms, the statute which *conferred* the jurisdiction, but that it contained other clauses which showed an intent that the repeal should operate immediately.

On the other hand, in Harvey vs. Tyler, 2 Wallace, on page 347, the rule of construction is said to be "*all* statutes are to be considered prospective, unless the language is expressly to the contrary, or there is a *necessary* implication to that effect."

Again, in 11 Wallace, on page 657, on the subject of repeal by implication, the law is determined to be, that

where both statutes can subsist together, an implication of repeal can not be allowed. And on page 656 of the same opinion we are informed that where the repealing clause of the new act, instead of repealing the old statute entirely, contents itself with a repeal of such acts and parts of acts *as are inconsistent with its own provisions*, we may infer an intent on the part of the law makers that it is not to annihilate *in toto* the act on which it is supposed to innovate.

Apply these principles here and give the act of 1879 a prospective operation. All future judgments and decrees will be embraced in its provisions, and the former statutes, inconsistent with its provisions, will be destroyed. As to existing appeals, on which the new act does not operate, the prior law can not be inconsistent with its terms, and applies to and regulates them. No rule of law is thus infringed, and full justice is due to all parties. The Supreme Court of the District, as remodeled, will have greater sway and wider discretion, but the old cases, heard before the old Court, will go on as before, undisturbed by the new arrangement. Any other construction would forfeit bonds given for costs, and work, in many ways, serious injustice.

Moreover, the intent of the Congress, that the act is to be prospective, may be gathered from its terms. Some of its most beneficial provisions can not, from the nature of things, apply to past determinations. The Court is remodeled and enlarged, and the second section of the act prohibits, in express terms, judges from sitting in appeals from their own decisions. This shows that Congress thought the former practice an evil and an injury to suitors. To bring prior cases within the provisions of the act, this clause should also apply to them, otherwise they would be cut off from its advantages while exposed to its rigor. Congress conferred the unlimited discretion to a larger amount only on account of the additional safeguards which they provided for its exercise. A most important one is, that no judge shall influence the appeal from his own decision. The ap-

peal shall be in reality as in form an appeal from him to others.

Now, in this case, we were not only exposed to the evils of the former rule, but underwent its actual operation.

Three Judges heard this appeal. One of them was the Judge whose decision was controverted. The other two divided in their views, and the Judge who heard the case below, by voting to affirm himself, really decided his own appeal. We insist that in such cases Congress did not intend the new act to operate, and that the discretion of the Court is enlarged only when there have been decisions of two really distinct tribunals. In such cases there would be no hardship. In our case we have a right to complain that all the benefits of the new statute are denied to us, and that we are exposed to evils which its framers never contemplated should apply to any case. Construe the statute prospectively, and no harm results. The other construction defeats the design of the law-makers in this material point.

Respectfully submitted,

HANNA & JOHNSTON,
JOHN SCOTT,
For Appellants.

In the Supreme Court of the United States.

No. 211, October Term, 1878.

WELLINGTON GODDEN and others,
Appellants,

vs.

MARY A. S. KIMMELL and others,
Appellees.

Appeal from the Supreme Court of the District of Columbia.

BRIEF OF COUNSEL FOR APPELLANTS.

HANNA & JOHNSTON,
JOHN SCOTT,
For Appellants.

In the Supreme Court of the United States.

No. 211, October Term, 1878.

WELLINGTON GODDEN and others,
Appellants,

vs.

MARY A. S. KIMMELL and others,
Appellees.

Appeal from the Supreme Court of the District of Columbia.

BRIEF OF COUNSEL FOR APPELLANTS.

Statement of the Case.

The Bill of complaint in this cause was filed to enforce the claims of certain creditors of Edwin Walker against real estate in Washington city. Walker and Abraham Kimmell had for many years been carrying on the livery stable business in Washington, under the style of Walker & Kimmell, where they held lots 16, 17 and 18, in square No. 491 as tenants in common, using it for the business of the firm. The firm dissolved before 1857, and Walker who had incurred heavy individual liabilities in Richmond, Va., conveyed in that year all his Washington property both real and personal to Voltaire Willett, in trust for certain of his Richmond creditors named in the schedule to his deed. The personalty consisted of the accounts and stock of Walker & Kimmell; the real estate of the property above mentioned. The conveyance expressly provided that it was subject to the right of Kimmell to wind up the firm, and in that way enabled the latter to retain possession. The firm debts were duly paid.

Kimmell converted the personalty, and received ever since 1858 the rents of the real property and appropriated them to his individual use, (record page 8, clause 7 of answer.) The war came on before Kimmell accounted with the trustee, and while it was pending it seems that Walker, who never abandoned all hope of realizing something from his Washington property under the resulting trust in his favor, paid off a great many of his creditors in confederate money. After the war ended the complainants commenced negotiations with Walker, and when these were broken off by his death, filed the present bill to enforce the trust.

The Court sees, that, as matters then stood, the heirs of Kimmell, who had died in the meantime, held the legal title as tenants in common to one half of the real estate ; the legal title to the other half was in the heirs of the trustee for the benefit of such of the creditors named as remained unpaid, and, after they were satisfied, for the benefit of Walker's representatives. The title to Walker's half of the estate has never been in the Kimmells, and now is outstanding in the trustee's heirs, who have no right to retain it. They accordingly answered, disclaiming all interest and offering to abide by any decree that the Court might deem proper. (Record page 11.) The Kimmells answered, admitting the deed to Willett (page 8,) admitting also a joint conveyance by Kimmell and Willett, made in 1858, of a part of this property in which Kimmell recited the deed of trust and acknowledged its validity, but putting the complainants on proof of their claims, and setting out a long *affirmative* account of the manner in which they asserted that Kimmell acquired from Walker his one half of the estate. This last, being irresponsive to the bill and sustained by no proof, we may leave out of consideration. The representatives of Walker also answered, and claimed that the complainants had been paid off. (Page 13, record.)

The bill further assailed the transfer of a portion of this property as fraudulent. Subsequent to the deed of trust, Kimmell procured the trustee to unite in a deed of a part of the real estate, valued at $5000, by pursuading him that it was to pay off a partnership debt of $2500, and by promising

to account for Walker's share of the residue of the purchase money. (Page 24.) The answer of respondents admits that Kimmell, after this conveyance, held the property, and appropriated the rents to his own use. In 1868 they record a conveyance to him from the grantee in the former deed, which conveyance had been withheld from record for over four years, in which he took back the whole for only five dollars. (Page 26.) As the transaction appears, Kimmell never accounted for the remaining $2500 still due by the grantee, but kept all the rents, and finally received a transfer of the property to himself for nothing. The creditors insist that unexplained, the transaction was outrageously fraudulent, and that in any case the property returned to him burdened with a trust for one-half of the value, and of the rental. The respondents denied all fraud, and gave an affirmative explanation of the proceeding, which they have failed to prove. (Page 9.)

The question to be determined therefore is who are entitled to Walker's half of the estate and to the title outstanding in the heirs of the deceased trustee. There is no sort of question that Willett's heirs can bring ejectment at law or file a bill for partition, in either of which proceedings they must necessarily prevail. This would put in their hands the one half of the estate to hold as trustees for some one else, and then it would have to be determined in a separate proceeding in equity who their cestui que trusts are. The present suit combines these two proceedings, and the complainants first allege as against the Walkers that they are still cestui que trusts of Willett and his heirs, and secondly that the Court will now duly separate Walker's half of the property from what belongs to the Kimmells, and give them the benefit of it. The position which the latter occupy is a concession that neither they nor their father owned but one-half of the estate, and that in 1858, if the firm debts had been then discharged, Walker was entitled to the remaining half or any parties to whom he might choose to transfer it. They have held possession under that express admission, and of course have no right to property for which they have not paid a cent.

Walker's adminstrator has a more substantial interest. He was the owner of the property, and provided in the deed of

conveyance that all which remained after paying his creditors should be returned by the trustee to him. Every debt which he paid therefore increased his interest in this estate, and, should it turn out on a final account before the auditor, that the number of creditors still unpaid are insufficient to exhaust his estate, his representatives will receive a portion of his property. In no view can the Kimmells have any right to it. In this condition the case was referred to the auditor under instructions set out on page 40 of record, and testimony was taken both in Richmond under a commission and orally before him. Walker's representative appeared before the auditor by counsel, cross examining the witnesses, and after the complainants closed their case in May 1873, made repeated promises to take testimony to disprove or reduce the complainants' claims. In this way his able counsel procured the case to be adjourned from time to time for more than a year, and finally after obtaining every indulgence he asked for, abandoned the effort.

The Kimmells never appeared at all, though repeatedly summoned. They issued no commission, refused to cross-examine witnesses, and up to the time of argument before the Court gave us to understand that they deemed themselves unconcerned in the proof that Walker still owed the complainants' claims. After the testimony was over we thought it was a concession on all hands that the complainants were cestui que trusts under the deed of 1858 as unpaid creditors, and the sole ground on which the auditor referred the matter to the Court as to part of the property, was to ascertain if the production of the original choses in action was necessary, or if the admission contained in the schedule to the deed was sufficient proof. The testimony taken on the part of the complainants established that Walker had never paid them their indebtedness, that they retained the original causes of action in their counting-houses in Richmond until the fire of April 1865, when their houses, books and papers were all destroyed in the conflagration which laid waste the entire business part of that city. It established also the value, situation and character of the real estate, and the periods at which it was acquired. It also attacked a certain

conveyance by Kimmell and Willett of part of the real estate as fraudulent. The auditor reported the whole matter to the Court, who at first gave judgment in our favor. On a re-argument the bill was dismissed with costs, which decision was affirmed by a majority of the Supreme Court of the District.

Assignment of Errors.

The appellants assign as error that the Court failed to pass a decree cancelling and setting aside as fraudulent and void the conveyance, set out on page 23 of record, of Kimmell and Willett, trustees, to Kellellum H. Lambell, trustee, and the re-conveyance by said Lambell and Elizabeth Foulkes on pages 26 and 27, so far as they purport to convey any portion of the property therein mentioned which had passed to said Willet as trustee under the deed to him from Edwin Walker, set out on page 29 and following of the record.

Appellants further assign as error that the Court did not pass a decree that so much of the real estate mentioned in the proceedings as was formerly held by Edwin Walker, as tenant in common with said Kimmell, and which had been transferred to Voltaire Willett from Walker by the deed above mentioned, should be sold by a trustee duly appointed, and the proceeds distributed among the complainants and the other creditors of said Walker secured by the deed, subject to the prior claims of partnership creditors of said Walker & Kimmell, if any such appear before said final distribution.

Appellants further assign as error that the Court did not order that the executrix of said Kimmell, the respondent, Mary A. S. Kimmell, should account for, and pay over to a trustee duly appointed, so much of the personal assets of said Walker & Kimmell as was held by Kimmell at the date of Walker's said deed to Willett, trustee, and which then belonged to said Walker, to be divided among complainants and other creditors of Walker secured by said trust deed, subject to the legal priorities of said partnership creditors.

Appellants further assign as error that the bill of complaint in this cause was dismissed with costs, when it should

have been retained, and relief granted on the allegations therein contained, as supported by the evidence in the cause.

Appellants further assign as error that a decree was not passed, ordering the representatives of Kimmell to account for the rents of the real estate conveyed to said trustee up to the date of the decree in this cause, and making the amount of the said rental a charge on the remaining half of the real estate, unless it should be discharged from the personal assets of said Kimmell.

Points of Argument.

The legal propositions necessary to make out complainants' case have been conceded all along by the lower Courts. They are as follows: The validity of the trust deed being admitted by the answer; the sufficiency of its schedule to establish complainants' claims, especially when taken in connection with the oral testimony; the fact that the period of limitations had not expired; and the entire failure of respondents to prove any part of the long affirmative case set out in their answer. Indeed, these points would hardly be seriously questioned. We will reserve, therefore, what we have to say on these subjects, as well as on the question of fraud as to part of this property, until we have briefly discussed the grounds on which the bill was dismissed, viz: on account of the laches of complainants.

It will not be necessary to go outside of the decisions of this Court to ascertain the law relating to laches. From them it abundantly appears that, althongh laches is mainly to depend on the facts of each case, still there are some well-settled principles which limit and determine this doctrine. In the first place, laches is an equitable rule outside of, and independent of, the Statutes of Limitations. It is sometimes blended with the defense of limitations in the opinion of the Court, because both defenses apply to the case. Sometimes it is, perhaps carelessly, ranked with the application in equity of the Statutes of Limitations by way of analogy. But there is no doubt that, without any Statutes of Limitations at all, equity has its own rule on the subject, and that there is no fixed number of years on which its application depends. In

this main characteristic it is easily distinguishable from the defense of limitations. It is equally variant in that it is a punishment for actual transgression, and is never applied, except where the party has been not only in fault, but in such fault as has hampered and impeded the Court in finding out the truth of the case, and in doing full justice among the parties. The complaint is then rejected, because the plaintiff has done wrong by resting on his rights so long as to make the evidence uncertain, and to allow others to enter into transactions on the assumption that he has acquiesced in the assertion of their claims. It follows, necessarily, therefore, that if the evidence is still satisfactory, so that the Court is convinced the claim is well founded, one main obstacle to relief is satisfactorily removed.

To get rid of the other it is enough to show that no change of condition has occurred or contract been entered into by the persons holding the property in suit in reliance on the acquiescence in their assertion of ownership. A hostile holding is, therefore, an essential pre-requisite, for no man is called on to take his property from a trustee and friend. As long as the possessor is not adverse, the cestui que trust is in full ownership, and his rights considered as guarded and maintained. Accordingly, on reviewing the various precedents of this Court, we find that when relief was refused the action of the defendants had been invariably adverse.

In some the complainant attempted to set aside a judgment or decree, the procuring of which was an assertion of right. In some the effort was to vacate a conveyance for fraud, which itself involved an admission of a hostile claim. In others, again, the matters had been wound up by settlement between the parties, and the corporations concerned in the transactions finally dissolved.

Marsh vs. Whitman, 21 Wallace, 185.
Badger vs. Badger, 2 Wallace, 92, &c
McKnight vs. Taylor, 1 Howard, 161.
Michoud vs. Girod, 4 Howard, 561.
Pairo vs. Vickery, 37 Md. 487, &c.

To apply these principles here. The bill shows the complainants to have been residents of Richmond and creditors of Edwin Walker. The property in question had been held by Walker as tenant in common with his former partner, in whose possession it had been for some time. The deed of trust recited these facts, recited the right of Kimmell to wind up the partnership with this property, and conveyed it expressly subject to this right. The terms of the deed of trust, therefore, prevented the trustee and the creditors from either taking immediate possession or from enforcing a sale. A reasonable time had first to elapse within which the partnership would be wound up.

Before the execution of the deed Kimmell had made no claim to Walker's half of the property in any way. In April, 1859, (page 23,) a deed of Willett, trustee, and of Kimmell, was put on record, in which the latter acknowledged the rights of the trustee, admitted that he himself held exclusive possession only on account of his right to pay off partnership debts, affirmed that this very conveyance was intended as part of such a settlement, and covenanted to account with the trustee for Walker's share of the proceeds of that conveyance. Here, in 1859, was a broad and unqualified admission of every right the creditors now claim. This conveyance, recognizing their claims to the very utmost, and coming from the party who held possession of the property, was, undoubtedly calculated to quiet their apprehensions. They now file their bill to enforce these identical claims, and exhibit Kimmell's deed as an admission that he held in trust for them, subject to the prior demands of the partnership creditors.

When did the holding become adverse? In 1859 the property was in the hands of a person who was friendly to their interests, and the war came on before they were allowed, by the terms of the deed of trust, to prosecute their rights in Court, even if they had so desired. However this may be, it cannot be said that they were guilty of laches in not taking immediate steps after Kimmell's acknowledgement of their rights. The trust was admitted, and was a continuing trust; and it is too well established that as long as this lasts the

cestui que trust is deemed to be in full possession and occupancy of the property.

Seymour vs. Freer, 8 Wallace, on page 218.
Kane vs. Bloodgood, 7 Johns. Ch. 122, &c.
Bowie vs. Stonestreet, 6 Md. 431 and 432.
White vs. White, 1 Md. Ch. Dec., on page 56.

During the war, of course, nothing could be done, and this Court has decided that it terminated in the Spring of 1866. The end of the war found the complainants with their books and evidences of debt destroyed by the Richmond fire or mislaid in the confusion which it caused. (Page 35, &c.)

One of the complainants had not then even learned of the existence of the deed of trust. (Top of page 55.) The bill was filed in February, 1871, less than five years after the war closed; and the only laches of which complainants can possibly be accused was, that they waited during that time. We deny that any precedent has, in a case of this kind, applied the doctrine of laches during so short a period. That time was scant enough in which to investigate all the circumstances of this case, to employ counsel, and actually institute proceedings.

In the next place, no change has taken place in the holding of this property, nor have new rights been acquired by any person whatever. The main portion stands just as it did at the date of Walker's deed. No conveyance has been made, and, so far as we know, none even attempted. There was the best of all reasons for this. No title could be possibly transferred by Kimmell or his representatives. The record shows the title to have been in Walker & Kimmell, as tenants in common, and that subsequently, by Walker's conveyance, Willett had been substituted in his place. To this Kimmell had assented, and after the trustee died, no conveyance could be made without the appointment of a successor. Kimmell had never claimed the property, and it is hardly worth while citing cases to show that the holding of one tenant in common is not adverse to the others. We confine ourselves to Maryland de-

cisions, because the law of that State on this subject is the same with that of the District of Columbia.

Van Bibber's lessee vs. Frazier, 17 Md. 451.
Gwynn vs. Jones, 2 G. & J. (Md.) on page 184.
Crawford vs. Severson, 5 Gill, on page 448.
Greenwood vs. Greenwood, 5 Md., on page 336.
Adams on Ejectment, marg. page 55.
McClung vs. Ross, 5 Wheat. 124.

The Court will, moreover, observe that the dismissal of this bill involves a denial of Walker's rights to this property. Walker has conveyed all his title to the trustee, reserving to himself a resulting equitable trust after payment of his creditors, instead of his full legal title. His representatives would have, in case the complainants' debts have been discharged, to file a bill of this character to obtain what was left to the grantor. In other words, the trustee, who would be properly complainant if he were alive, unites with his legal title as tenant in common all the equities, both of grantor and creditors, which can possibly inhere in this subject. If we prevail, and the property is sold and proceeds brought into Court, Walker's representatives can except to the claims then filed, and each one that is shown to be paid or barred by laches, before the auditor, is stricken from the list. If all are barred, Walker's heirs will obtain the whole; and in this way it is plain that no harm can be done, but the property will go to its real owner. Refuse our prayer, and the decree stands as *res adjudicata* against all parties. Then the Kimmells will get not only from the creditors, but also from their father's partner every dollar he has in the world, when if he were here asserting his former rights as tenant in common, their defense would be simply a subject of ridicule. How will they stand? as having successfully defended againt a co-tenant, on the ground that they have lulled him to sleep by an unreserved admission of his rights placed on record.

A very plain demonstration of the correctness of our position is afforded by separating the elements of relief which are blended in this case. If we had contented ourselves with al-

leging the execution of the deed of trust and the death of the trustee, and had asked for the appointment of his successor for the enforcement of the trusts, it is plain not only that the relief must have been granted, but that the heirs of Kimmell would not have been proper parties to that bill. They would not have been heard to object, for in that aspect it could be seen that they had nothing to do with the case. If they had petitioned to come in on the ground of laches on complainants' part, the answer that Walker's heirs were alone concerned in that defense, and that they too were interested in the trustee's appointment, would have been obviously recognized as sufficient. After the trustee had been appointed, he could have brought ejectment for one-half of the real estate, or filed a bill for a partition or sale. To such a suit the Kimmells would have been the only defendants; and it will hardly be denied that neither laches nor limitations could have been urged in their behalf. The trustee must, of necessity, prevailed, and the result would have been to bring the proceeds of this property into Court for apportionment between Walker's representatives and such of his creditors as they could not in justice exclude.

Had we, therefore, not encumbered the judicial mind with both suits at the same time, but brought one for each separate purpose, our course would have been plain and easy.

We united the two bills to prevent a multiplicity of suits, and we are now to find that independent propositions are no longer separate; that by reason of their being set out in the same bill they have ceased to be distinct; that the Kimmells can not only use a defense belonging only to the Walker heirs, but so use it as to cut the latter out of their own rights, and to hold the property, which, in a suit against themselves alone, they would have been obliged to surrender to the owners.

II. We will now proceed to advert to some other objections to the relief which we pray. It may be urged that most of the claims secured in the deed of trust were barred by limitations at the time of the filing of the bill. Leaving out of the case the question as to whether the enumeration of them in the deed is not equivalent to the merger of the simple contract debts and a conversion of them into specialties, in which

case the statute had not applied at the date of the filing of this bill, we answer that we are not seeking personal relief against Walker or his representatives. The deed secured these debts on certain specified property, and it is familiar law that such a transaction conveys to the creditor an interest in the property itself in addition to his general rights as a creditor. After his debt is barred by limitations he can still pursue his interest in the thing transferred within the period of limitations applicable to that species of property. Here the subject matter is real estate, and the Maryland Statute of Limitations in force in the District gives the complainants twenty years within which to proceed against realty.

Moreton vs. Harrison, 1 Bland Ch. (Md.) pages 500 and 501.

Eastman vs. Foster, 8 Metcalf, on page 24.

Alexander's British Statutes, page 451, &c.

Moreover, as we attempted to show elsewhere, no limitations can apply to a continuing trust prior to an adverse holding by the trustee.

III. It was also objected that a certified copy of the deed of trust is not legal evidence of its contents, since it was not recorded in the time required by the Act of Congress. We were relieved from the necessity of producing the original deed or of proving its contents, by the admission in the answer, even if the Act of Congress be capable of the construction contended for.

It was also urged that the Maryland Statute of Limitations, declaring that no specialty shall be good and pleadable in evidence after twelve years, controlled this case. In the first place, we reply, that twelve years had not lapsed before suit was brought, deducting, according to the established law of this land, the period of the intervention of hostilities.

Adger vs. Alston, 15 Wallace, 560.

The Protector, 12 Wallace, 702.

Hanger vs. Abbott, 6 Wallace, 532.

In the next place, it has been settled by a uniform current of decisions that this act, notwithstanding its peculiar wording, is merely a Statute of Limitations, and applies only when the object of the suit is to recover judgment for the amount of the specialty itself. As evidence of another debt, or to show a debt once good and sufficient to be a consideration for an express promise, a specialty can always be read.

Lamar vs. Mauro, 10 G. & J. (Md.) 50 and 62.
4 H. & J. 541.

IV. A further objection made by the auditor is, that the amounts of the complainants claims are not set out with sufficient fullness in the bill. This must have come from his inadvertently forgetting that the deed was expressly made part of the bill, the schedule of which gives the several amounts which the complainants held against Walker at the time. But, passing by this as a slight matter, the auditor objects that in regard to every complainant, except one who filed a note proved to be a renewal of one mentioned in the deed, the original choses in action are not produced.

In the first place, we reply, that they are proved to have been burned, (page 35,) and this justified the introduction of secondary evidence of their contents under a most familiar rule of law.

In the second place all of the books establish that a parol admission of the contents of any written instrument is primary evidence, even though the instrument be under seal and in the power of the party offering the secondary proof. This is a well established exception to the rule requiring the production of the best evidence.

Taylor vs. Peck, 21 Gratt, page 20, &c.
Slatterie vs. Pooley, 6 M. & W. 664.
Roscoe Digest Evidence, 12 Edn. 63 and 64.
Smith vs. Palmer, 6 Cush. (Mass.) 520 and 521.
Loomis vs. Wadham's Admr. 8 Gray 562.
Philips Ev. 4th Am. Edn. 425, 471, 421, 422, 423, 424.

The admission which we offer is contained in a solemn deed under the hand and seal of the party, specifying the names of the creditors, and the amount and character of their claims, with fullness and detail. As an illustration on page 13 the Court will find one debt to be set out as due to Edmond Davenport & Co., on a due bill for borowed money $500.00. This admission is as full as the due bill itself; it shows that the claim was not negotiable, and perhaps merges it on account of the higher dignity of the sealed instrument. It is certainly as strongly convincing evidence of the debt as the due bill itself. The Court will also bear in mind, that all we had to adduce was *prima facie* evidence, for no proof in dispute of these claims was offered by any party.

V. On the question of fraud the proof is that in the joint deed by Kimmell & Willett, in which the former expressly adknowledged the trustee's title to all of the real estate owned by Walker, the consideration is said to be $5000, a part of which was to be paid by the grantee's liquidating her claim of about $2500 against the firm of Walker & Kimmell. The other $2500 was to be paid over to Kimmell; he covenanting to account to Willett for Walker's share of it.

The answer admits that the transferree never took possession, but that Kimmell held the property as his own, and appropriated the rent to his individual use. That raises at least a presumption that the conveyance was not *bona fide*, as parties do not generally pay $5,000 for property in order that one of transferrors may enjoy it. The grantee never paid the remaining half of the $5,000 so far as the case shows; the note which she professed to hold has never been surrendered, and in 1864 she reconveyed the whole property which had cost her $5,000, to Kimmell for $5 without even providing that the debt of $2,500 and interest which he held against her on account of it should be deemed extinguished. According to the testimony, she bought the property for $5,000, thereby losing her claim against the firm by the purchase and incurring a debt for 2,500. In 1864 after this debt had been accumulating by successive additions of interest she reconveyed the property for $5, leaving herself in debt,

and the respondents admit that, before the reconveyance as well as after, Kimmell used it as his individual property. Had all these facts been contested and we had succeeded in establishing them to the Court's satisfaction, every one would say we had made out a case of fraud. Here they stand unquestioned, and all that we have to do is adduce *prima facie* evidence sufficient to throw the *onus* of clearing the matter upon the other side. Both the grantee and her trustee are in existence, as we are informed, and yet their testimony is not offered to clear up this dark transaction. Unless all we read in the cases where deeds are vacated for fraud is mockery, we have made out our contention most abundantly.

We submit we are entitled to a decree for the partition and sale of this property, and for an account of the rent since 1858 from the representatives of the other tenant in common.

As to the point that no assent of the cestui que trusts is necessary to make the deed of trust vest an interest in them, see

Brooks vs. Marbury, 11 Wheat. 96 and 97.
Osborne vs. Noble, 46 Miss. 455.
Moses vs. Murgatroyd, 1 John Ch. 129.

Respectfully submitted,

HANNA & JOHNSTON,
JOHN SCOTT,
For Appellants.

Supreme Court of the United States.

No. 211.

WELLINGTON GODDEN ET AL., APPELLANTS,

vs.

MARY A. S. KIMMELL, ADM'X, ET AL., APPELLEES,

GEORGE F. APPLEBY,
CALDERON CARLISLE,
For Appellees.

LAW REPORTER, Pr., 631 F St.

Supreme Court of the United States.

No. 211.

WELLINGTON GODDEN ET AL., APPELLANTS,

vs.

MARY A. S. KIMMELL. ADM'X, ET AL., APPELLEES,

This cause comes up on appeal from the Supreme Court of the District of Columbia.

The case was heard below in the special term on the exceptions of complainants to the auditor's report and the bill dismissed with costs. The general term affirmed the decision of the special term.

Statement.

This bill was filed in February, 1871, by Godden and others, separate creditors, before 1857, as alleged (Rec., pp. 5, 6,) of one Edwin Walker, *deceased*, a partner some time before October, 1857 (Rec., p. 23), of Abram F. Kimmell, *deceased*, against the administratrix and heirs of the said Kimmell, the executors of one Voltaire Willett, trustee, *deceased*, and the administrator and heir of Edwin Walker, *deceased;* Walker, Kimmell, and Willett, all died within three years before the filing of the bill. (Rec., pp. 9, 13.)

There was never any formal dissolution of the partnership. The Kimmells aver in their answer (Rec., p. 9) that Walker "some years prior to the year 1857, to wit, in the year 1846, left Washington and went to Richmond, Va., where he engaged in business with one B. W. Green;" and the testimony of complainants shows (Rec., pp. 34, 35,

36) that Walker resided in Richmond, and did business there perhaps as early as the year 1845; certainly for twenty years before his death, in 1871.

The rights of these claimants, *if any they have*, to file this bill against the Kimmell defendants, sprang from a certain deed executed in Richmond, Va., October 8, 1857, by their alleged debtor, Edwin Walker, to one Voltaire Willett, a copy of which deed is exhibited with the bill. This deed (Rec., p. 3) after reciting that Walker and Kimmell "*have been* engaged as partners in the city of Washington, and in the *progress of said partnership* they have acquired certain real estate on C street, between 4½ and 6th streets, in said city; also certain personal property, including horses, carriages, buggies, sulkeys, and other property, and hold claims against various persons;" and "*are indebted to various persons in different amounts;*" and that said Edwin Walker is individually indebted to the persons named in schedules appended to the deed and denominated parties of the third part, and "*after paying all of the debts of the firm of Walker & Kimmell*, desires to convey his *interest* in the *firm* of Walker & Kimmell in trust to secure" the schedule debts, conveys "all of his, the said Edwin Walker's right, title, and interest in and to the real and personal property, debts, effects, credits, and *assets of every kind* whatever, and in any manner belonging to the *firm of Walker & Kimmell*, but *subject to* the debts and liabilities due from said firm, and to the RIGHTS OF SAID KIMMELL in winding up and paying off the same, *the true intent and meaning of this deed being only to convey* whatever *interest* said Walker MAY BE entitled to *after the liabilities of Walker & Kimmell have been paid off and discharged.*"

In the *habendum et tenendum* clause the "*true intent and meaning*" is still further guarded: "To have and to hold the said *interest* of the said Edwin Walker *in the said* FIRM of Walker & Kimmell, but *subject to the liabilities thereof;*

but upon *special trust* that the said Voltaire Willett will COLLECT the *interest* of the said Edwin Walker in said *firm* of Walker & Kimmell, and after paying the expenses of the trust will pay the creditors *pro rata;* or, if sufficient, in full; and if more than sufficient, the "*surplus* to said Edwin Walker, his executors, administrators or assigns."

There is no averment in the bill that any interest in the *partnership property* was ever *collected* by the trustee, or could have been *collected* by him under this deed from Walker, and none of complainants are judgment creditors.

During a period of fourteen years (1857 to 1871) none of them appear to have taken any step whatever during the lifetime of the partners and trustee or any of them, towards ascertaining or enforcing their rights, if any, under this deed. On the contrary, some of them, and the very ones the amount of whose alleged claims give them perhaps a standing in this court, have shown by their conduct in suing at law, that they declined to accept the provisions of the deed.

The trustee never took any beneficial title whatever to the realty. He did by the words of the deed take the mere naked legal title, without the right ever to obtain possession. He could not have maintained ejectment, because by *this very deed* the right of possession was secured to Kimmell. He could not require partition, because this realty was made *partnership property, subject to partnership liabilities*, and to the rights of Kimmell alone to wind up the concern. He could not even maintain a bill for an account, (unless he should subject himself expressly to the *liability*, if any, of Walker upon settlement), and *this*, nothing in his trust warranted him in doing. This trustee had no power to sell. *Kimmell had the power expressly given to him to wind up the partnership.* The realty was made *partnership property*, expressly subject to Kimmell's rights in winding up the partnership; and in pursuance of said power and right, Kimmell could have *required* the trus-

tee to join in selling *all* the property to pay partnership debts as he did as to *part*. Rec., p. 23.

Walker might have joined his trustee in a suit for an account, of his own motion, or at the suggestion of the trustee or creditors, but he did not do so, and now Walker, Willett, and Kimmell are dead.

Before there can be any subject-matter on which the alleged rights of these complainants in Walker's share in the partnership property can operate, there *must be an account of the partnership.*

The bill does not allege a settlement of the partnership account, nor as much as allude to the account, but seems purposely to evade the same, for it does not even pray such an account, (prayers, Rec. p. 3), and the answer of the defendants Kimmell avers that after this long lapse of time, and the death of both parties to this transaction, "such an account would be difficult, expensive, and unsatisfactory," (p. 10.) Nevertheless these defendants consented that the auditor be required to ascertain and state the partnership account, (Rec. p. 40), and a *subpœna duces tecum* was issued to Mary A. S. Kimmell, the administratrix, requiring her to bring all the books of the firm, (Rec. p. 41.) She is returned summoned and without doubt promptly obeyed

The bill does pray that the administratrix and heirs of Kimmell "*account* WITH and pay over to YOUR COMPLAINANTS the rents and profits which have accrued on said estate, *conveyed* AS ABOVE, to said Voltaire Willett, since the year 1858." (Rec., p. 3.)

The bill charges that lots 16, 17, 18 and 19, in square 491, were held and used as partnership property by Walker and Kimmell. The Kimmell's answer denies this, and avers that the firm never owned any of the real estate mentioned, except lot 16, and parts of lots 17 and 18; that the remaining parts of lots 17 and 18 belonged to Kimmell, individually, and lot 19 was the property of a

stranger to this suit; and the testimony adduced by complainants supports the answer of the Kimmells in this respect. (Rec., pp. 17, 19.)

The bill charges that Kimmell fraudulently procured the trustee, Willett, to unite with him in conveying the parts of lots 17 and 18, which were firm property, to one Lambell, trustee of the separate estate of Mrs. Foulkes, who was a creditor of the partnership out of said separate estate. This charge is denied by the Kimmells' answer, and there is not a particle of testimony to support it. The deed, on its face, shows that it was made by Willett, in conjunction with Kimmell, in pursuance of the provisions of Walker's trust, and that Kimmell simply exercised the very power and right secured to him by Walker's deed. Willett himself was a creditor named in the schedule to the Walker deed.

The complainants seek to set aside the said deed, without making the said Lambell and Foulkes parties defendants. The appellants, in their brief, say (p. 15) that they are informed that the grantee and her trustee are still alive, and complain that their testimony was not adduced, as if this fact tended to increase suspicion. There is nothing in the record to show that these parties are still alive, or have been since the beginning of the suit. We do not know where they got their information, but the same source of information which enabled complainants to aver in the bill of complaint that Mrs. Foulkes was a sister-in law of Kimmell, ought to have apprised them that Mrs. Foulkes was the only sister of Mrs. Kimmell, lived with her on these parts of lots 17 and 18, and died before the commencement of this suit, and that her trustee died before Kimmell did.

The complainants allege that they are unpaid creditors of Walker. The Kimmells and Walker's administrator deny in their answers that these complainants are unpaid creditors of Walker, (Rec., pp. 9, 13.) The onus is, there-

fore, on these complainants to show a subsisting indebtedness of Walker's estate. The admission of the deed of 1857, if it be considered an admission under seal, is not good and pleadable in evidence under the Maryland statute of 1715, because of more than twelve years standing. The debts must then be proved.

In the first place, it is averred in the Kimmells' answer, (Rec., p. 1,) that they are informed and believe that this suit is not authorized by complainants Godden and Apperson, who give the name to the suit. However this may be, certain it is that a commission issued to take their testimony with that of other witnesses for complainant, and *neither Godden nor Appperson testified under the commission*, (Rec., pp. 15, 29, 39,) and it further appears (Rec., p. 61,) that said complainants *abandoned the suit* after the hearing in the special term below. Of the remaining creditors parties complainant here, none are entitled to a standing in this court by reason of their individual claims which do not exceed the sum of twenty-five hundred dollars, except, perhaps, three, and as to these claims the testimony is incomplete, vague, and indefinite, besides being obnoxious to the very serious objection taken on the examination of Davenport, of Blair, his partner, and of Isaacs, the only witnesses as to two of the claims, by the solicitor of Walker's administrator, *as relating to transactions with and declarations by a decedent*, even if the amount of their claims as set out in the schedule be admitted to be the test of jurisdiction.

The auditor to whom the cause was referred by a consent order, more favorable to the complainants' case than the structure of the bill warranted, characterizes the proceedings in this cause as "involved in obscurity," and all the testimony as "incomplete, vague, and indefinite." The auditor reports only one instance in which the amount due to any one of the complainants under the schedule to the

deed of trust "has been proven with *any reasonable degree of certainty.*"

That claim was $1,148.79, and with interest calculated to this day, would not amount to $2,500. All the evidence as to the claim is incompetent, and upon examination of the witness's testimony, twice given, it will be seen that it was contradictory and very unsatisfactory.

But the amount of the individual claims *as stated in the schedule* cannot be the test of jurisdiction, for the deed to which it is attached provides for the payment pro rata of claims amounting to $186,000 ; and imagination untrammelled could not make the pro rata share of any individual claimant in the *interest* conveyed by the deed *an amount exceeding* $2,500.

The realty was not by the deed made subject *as such* to these claims ; Walker's *interest in the fund after settlement of partnership liabilities* was the only thing conveyed to the trustee. But even if the realty were *as such* made liable to these claims, its value is not averred ; and if it is sought to discover it by inference, it will appear to be less than $5,000. Rec., p. 17. The moiety of this would be less than $2,500, and we have $186,000 to be paid *pro rata* out of this.

The complainants excepted to the auditor's report because he did not "*report as liens* against the property *in the said cause described,*" the claims of each and every complainant. (Rec., pp. 59–60.) There was no other exception whatever.

There is not a single allegation in the bill nor a particle of proof to excuse the manifest *laches* of complainants. There is no allegation that these complainants are entitled to claim the benefit of the war period in extenuation of their *laches.* The bill avers that they are now residents of Virginia, but it does not aver that they were residents there during the war. The complainants show that they are conscious of their laches, and make but one *attempt*

in the bill to offer the slightest explanation—*i. e.*, Rec., p. 2, "that they have been delayed in the prosecution of their rights by the death of said Walker, Willett & Kimmell." The answer of the Kimmells (Rec., pp. 9 and 10), denies that their deaths have or could have produced any delay in the prosecution of the said claims, inasmuch as all of them have died in and since 1868, and charges "that not the deaths of these persons but their lives delayed the prosecution of the said claims; for no attempt was made in the lifetime of either of them to set up the rights now sought to be enforced, and it is only since the death of all of them that the said complainants have brought forward the pretensions set forth in the bill of complaint, and they verily believe that had the said parties been living this suit would not have been commenced."

The answer of Walker's administrator denies that said complainants "were hindered or delayed in the prosecution or collection of their alleged debts by the death of the said Walker, Kimmell & Willett, but charges that the said deaths have recently occurred, all within the last three years." The testimony shows that Walker died in 1871. Rec., p. 49. The bill was filed early in that year.

Walker's administrator, by his counsel, Mr. Davidge, interposes defences of limitations and staleness of demand to the testimony offered by complainants, as well as the objection, already mentioned above, to the incompetency of all their testimony, (Rec., pp. 51, 52, 55;) and the Kimmells in their answer (Rec., p. 10) set up the defence in these words: "That the said claims are stale demands of a character not countenanced in courts of equity, and it would be inequitable and unjust if they should now be permitted to enfore an account from these defendants after having slept upon their rights, if any they have, for so long a time, and until all the parties to the transaction are dead."

Points of Argument.

I.

The bill of complaint discloses a case which cannot call into action the powers of a court of equity.

The appellants have referred to the decisions of this court in McKnight *vs.* Taylor, 1 How., 168, and in Marsh *vs.* Whitmore, 21 Wall., 185, to show that this case does not come within the reasons assigned for the defense of laches in bar of equitable relief. They are unfortunate in their citations. McKnight *vs.* Taylor was a District of Columbia case. There was a deed of trust to secure certain creditors named in a schedule annexed to the deed. The bill was filed by the *trustee* himself within twenty years. The court below decreed that the amount of the debts mentioned in schedule should be paid, and in default of payment by a day limited, the property should be sold. This court reversed that decree and directed the court below to dismiss the bill of complaint with costs. In delivering the opinion of the court Chief Justice Taney says: "We do not found our judgment upon the presumption of payment. For it is not merely on the presumption of payment or in analogy to the Statute of Limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence to call into action the powers of the court. In matters of account where they are not barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from *considerations of public policy* and from the *difficulty of doing* ENTIRE *justice*, when the original transactions have become *obscure* by time, and the *evidence may be lost*. The rule upon this subject must be considered as settled by the decision of this court in Piatt *vs.* Vattier, 9 Peters, 416, and that nothing can call a court of chancery into activity but conscience, good faith, and reasonable diligence, and where these are wanting, the

court is passive and does nothing, and, therefore, from the beginning of equity jurisdiction, there was always a limitation of suit in that court."

Chief Justice Taney says, also—"It certainly cannot be said that there has been anything like reasonable diligence by any of the creditors in the case before us; and at this distance of time, when many of the parties originally concerned are dead, we should hardly do justice between them, if we required the appellant to pay the whole amount stated in the schedule, unless he can establish the credit he claims by legal proofs."

In Marsh *vs.* Whitmore, the claim was eleven years old, and was declared stale and the bill was dismissed. An averment in the bill of complaint, that the complainant was not aware of the matter in controversy "until lately," was held to be too vague to invoke the action of a court of equity.

This rule, says Justice Swayne, delivering the opinion of this court in Brown *vs.* County of Buena Vista, 95 United States, p. 161, "like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence and other means of proof. The rule which gives it the effect prescribed, is necessary to the peace, repose and welfare of society."

Were the rule otherwise, says Justice Story, "demands would perpetually spring up after the evidence to repel them was gone, by the death or dispersion of witnesses, or by the loss of important documents. So that lapse of time and acquiesence of parties constitute material ingredients in every claim which is sought to be enforced through the instrumentality of tribunals of justice. When there are no positive bars, presumptions are often indulged, which are equally fatal to a recovery."

2 Sumner Cir. Ct. R., 212.

In White *vs.* Parnther, 1 Knapp, pp. 227, 228, Lord Wynford said, "When property has been so long in the possession of a family that it has passed to the children of those who first acquired it, and they, unconscious of any defect of title, have formed their habits and plans of life according to the income that the property produces, it would be cruel to deprive them of it. After a great lapse of time, it is impossible to get at truth so as to do justice upon any case. That the parties to the original transaction are long since dead, we know from the papers in the cause. It is most probable that all their clerks and agents are also dead; there is, therefore, no one who can give any explanation of any paper that may be produced, or show under what circumstances it was written. The delay that has subjected respondent to this difficulty as to proof, is entirely to be attributed to the appellants, and it would be injustice to give them the benefit of a difficulty which they have solely occasioned."

If, as asserted by the appellants, the court below dismissed the bill solely on the ground of laches; it was certainly "competent for that court to apply the inherent principles of its own system of jurisprudence and to decide accordingly."

Sullivan *vs.* Portland R. R. Co., 94 U. S., 811.

II.

The bill does not specifically set forth any grounds constituting impediments to an earlier prosecution of the suit.

The appellants, in their argument, claim the deduction of the war period, but there is no allegation in the bill of complaint that they were residents of Richmond, or of any other place within the rebel lines during the late war.

Every intendment is to be taken against the pleader in a bill of complaint, and unfavorable presumptions are made against him as to facts not averred.

Foss *vs.* Harbottle, 2 Hare, 503.

The case of Hanger *vs.* Abbott, 6 Wall., 532, cited by appellant, in support of the deduction of the war period, was decided by this court in 1867, before either Willett, Kimmell or Walker had deceased, and four years before the bill was filed in the court below.

In view of this well known decision—if the complainants could have availed themselves of the war period, they should have averred it in their bill—and certainly, the court will not presume that they were rebels in order to help their defective pleadings.

Willett however, through whom they claim and who they allege was their trustee holding for them the legal title, was a resident of Washington. It is not even asserted that he was not a resident of Washington during the war, and he had, according to appellants the right to bring ejectment. He did not do it if he had the right, and the fifteen years within which he could have done it have elapsed. (Acts of Legislative Assembly, D. C., p. 124). If he could have brought ejectment for the realty, he could have replevied the personalty, and the three years for bringing replevin (Act of Md., 1715, chap. 23), had elapsed before the filing of the suit. If their trustee be barred at law, "it cannot be maintained that supine negligence and lapse of time are less efficient in a court of equity," (New Albany *vs.* Burke, 8 Wall., 107,) and that the so-called *cestuis que trustent* occupy a better position than their trustee.

The complainants show by their bill that they were conscious of their supine negligence, because they say that they have been delayed in the prosecution of their rights by the deaths of said Walker, Willett, and Kimmell. This is denied by the answers of the Walker and Kimmell heirs. They say that not their deaths but their lives, were the cause of the delay. The allegation in the bill is shown to be untrue by the testimony of the complainant Isaacs, page 55, which was taken on 23d of April, 1873. He says,

"I first heard of this deed of trust on the Washington property about two years ago," which was about the time of the filing of the bill. How could he then aver in his bill that the death of Kimmell or Willett, one of which events, by the answer is shown to have been in 1868, delayed him in the prosecution of this rights under the deed of trust? In his testimony given December 12, 1871, in Richmond, (see page 38) he says, he has seen the due bills held by him within the last five years, but that he has mislaid them, that he sued Kimmell and Walker in 1859; that Kimmell was in possession of the property at the date of the execution of the deed. The fact that he sued Kimmell and Walker in 1859, and that he knew Kimmell was in possession of this property, shows very plainly that upon inquiry or upon search at the record office in Washington, where he was represented by counsel, he could have known of this deed of trust, and even if there were an allegation in the bill to which this testimony instead of being repugnant would be pertinent, an allegation of general ignorance of things, a knowledge of which is easily ascertainable, is insufficient to set into action the remedies of equity.

McQuiddy *vs.* Ware, 20 Wall., p. 14.

This same witness says: "*Soon* after the *close* of the war, I employed counsel to prosecute the suit and he *delayed* some time in suing, because, he informed me he was trying to see if he could not get Walker during his life time to unite with us in suing Kimmell's *estate*, for a settlement of the accounts between them."

The claimant Davenport says in his testimony, page 34: "*Soon* after the *close* of the war, I employed a counsel to enforce the heir of this trust deed referred to in ninth interrogatory, and he informed me he was negotiating with Walker about the matter sometime before his death, trying to obtain from him a particular statement of account

between him and Kimmell." This witness knew of the deed of trust in Washington, (p. 34.) He was suing Walker and Kimmell in Washington, 1858 or 1859. A trial was had in 1859 or 1860, and the jury were unable to agree upon a verdict.

The amount of this debt in suit in Washington was the only debt which he could recollect as being secured by the deed of trust made by Walker to Willett. (Page 54.) These were acceptances of Walker & Kimmell to the amount of $4,000. (P 33.) Looking at the deed of trust it will be seen that only one such acceptance by E. Walker on W. & K., on which E., D. & Co. are endorsers, can be found. This is for $2,000, and was due January 22–25, 1858. He was quick to sue before the war when he knew of the deed of trust, and when one basis of Walker's credit with him was his Washington property. (Pp. 52, 53.) Now how quick was he to prosecute his suit after the war? He says *soon* after its close he employed a counsel to enforce the trust, but when this was actually sought to be done it is evident that Walker was dead; and as Walker died in 1871, according to Johnson's testimony (p. 49), it must have been at least five or six years after the war, and as the above cited testimony shows that Walker died after Willett and Kimmell, it was after their deaths that he first showed signs of action. There were no negotiations whatever with Walker, according to the record, excepting this attempt to get him to unite in suing Kimmell's estate, which is mere hearsay testimony, and it does not disclose what Walker intended or desired to do. He may have bluntly declined, knowing that a balance would be decreed against him in favor of Kimmell. The answer of the heirs of Kimmell and Walker to the effect that the lives of Kimmell, Willett and Walker delayed the prosecution of the suit is thus strongly corroborated.

These complainants have thus slept upon their alleged rights, "have waited for every actor in the premises ex-

cept themselves to die;" and when it is remembered that some of the parties they are now pursuing are infants, and probably were not born until after these claimants' alleged rights accrued, their laches "is a silent fact which has all the effect of positive statement."

Ch. J. Waite's Opinion in Crosby *vs.* Buchanan, 23 Wall, 455.

In Marsh *vs.* Whitmore, cited *supra*, this court, delivering its opinion through Mr. Justice Field, says that the party complainant "who appeals to the conscience of the chancellor in support of a claim where there has been laches in prosecuting it, or long acquiescence in the assertion of adverse rights, should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim. Otherwise," adds the court, "the chancellor may justly refuse to consider the case on his (the complainant's) own showing, without inquiring whether there is a demurrer or formal plea of the Statute of Limitations contained in the answer." The language used by the court was cited from the opinion of the court in Badger *vs* Badger, 2 Wallace, 95, delivered by Mr. Justice Grier, and in which it is held that a court does right to dismiss a bill asking it to grope after the truth of facts involved in the mists and obscurity consequent on a great lapse of time.

In this case it will be seen that the defense *is* set up in the answer.

III.

The complainants pray not for an account of the partnership to be taken between Walker & Kimmell, the need of which is shown in the deed itself, and was recognized by at least two of the camplainants (Rec., pp. 34, 38), but for an account of the rents and profits which have accrued on said estate since 1858. Such an account, even if the

complainants are entitled thereto, was the subject of concurrent jurisdiction of law and equity, and in such matters equity is controlled by the limitations governing in courts of law, and rather in obedience to the statute than by analogy with the law.

Sterns *vs.* Page, 7 How., 828, 830.
Badger *vs.* Badger, 2 Wall., 94.
Barber *vs.* Barber, 18 Vesey, 286.

In the District of Columbia the limitation to a suit for account is three years. (Act of 1715, ch. xxiii.) But these complainants cannot be entitled to any such account unless Walker, if alive, could have enforced such an account in 1871. The bill does not allege a demand by Walker in his lifetime for such an account, although many years had elapsed, before his death. (As to the necessity of such a demand see 19 Vesey, 180, and 6 Simons, 51.)

In England, where the statute bar is six years, Vice-Chancellor Wigram said: "In this court there is direct and very high authority for the proposition that a court of equity will not, after six years' acquiescence unexplained by circumstances or countervailed by acknowledgment, decree an account between a surviving partner and the estate of a deceased partner."

3 Hare, 374.

A fortiori ought this court not to pass a decree in this case when both partners are dead, and a time has elapsed greater than four times the statute period of limitation.

IV.

The complainants say further that they are entitled to a decree for partition. Such relief does not come within the scope of their bill. It contains no allegation that partition would be *to the interest and advantage of all concerned*, which is a necessary allegation under the laws of

Maryland, where there are infant co-tenants in common, as well in bills for partition as in those seeking a decree of sale. Laws of Maryland, 1785, ch. 72, § 12; 1794, ch. 60, § 8. But an effectual bar to any such relief is the fact that these complainants are in no sense tenants in common with the Kimmells of the realty in the bill mentioned or any of it; and a properly drawn bill for partition, if it had exhibited the deed of Walker to Willett, and made it part of the bill, could have been dismissed on demurrer.

1 Dev. & Bat., 514.

V.

The deed in question seems to have for its aim the security of Kimmell, for balance due him as alleged in the answer of the Kimmells, rather than the security of any of the separate creditors of Walker. If the latter thought it was for their security, they would have accepted its terms instead of instituting law suits on claims comprehended wtthin it as alleged; and Walker would have notified all the creditors named in the schedule. There is no averment and no proof that the creditors ever accepted the terms of this deed.

But even supposing Walker to have made this deed for the benefit of his creditors, the latter cannot ordinarily maintain any suit touching the property, but the suit should be in the name of the trustee.

Cooper Eq. Pl., 174–5; Story Eq. Pl., § 515.

All the circumstances of the case, as disclosed in different parts of the record, point to Kimmell as the real *cestui que trust* instead of any separate creditors of Walker. This being so, the interpretation of the deed must be governed by the principle of the decisions of Walwyn *vs.* Coutts (3 Mer., 707; reported also in 3 Sim., 14), Gerard *vs.* Lauderdale (3 Sim., 1, affirmed on appeal by the High Court of Chancery, and reported in 2 Rus. & Myln., 451),

where it was held that, after the death of a grantor in a deed conveying property to trustees on trust, to sell and to pay certain schedule creditors (named, as in this case, parties of the third part), a scheduled creditor had no equity against the trustees to enforce the execution of the trust, the conveyance vesting no right in the creditors. (See, also, Acton *vs.* Woodgate, 2. Myln. & R., 492, and Hughes *vs.* Stubbs, 1 Hare, 478.) In the case last cited, Vice Chancellor Wigram says:

"A man who, without communicating with his creditors, puts property into the hands of trustees for the purpose of paying his debts, proposes only a benefit to himself by the payment of his debts—his object is not to benefit his creditors. It would, therefore, be a result most remote from the contemplation of the debtor, if it should be held that any creditor, discovering the transaction, should be able to fasten upon the property, and invest himself with the character of a *cestui que trust.*"

VI.

The complainants seek to have the deeds from Willett and Kimmell to Lambell, trustee for Mrs. Foulkes, and from Lambell and Mrs. Foulkes to Kimmell, "declared null and void" for alleged fraud. They do not make Mrs. Foulkes and Lambell parties. The object of this proceeding being to assail a deed for the purpose of having it vacated, all the parties to the deed are necessary and proper parties to this cause, without whom no valid decree can be passed.

Ward *et al. vs.* Hollins *et al.*, 14 Md., 167.

If they are dead their representatives should be made parties. The complainants in their brief complain that the testimony of Mrs. Foulkes and of Mr. Lambell was not offered by the defendants. They seem to ignore the fact that if they had made proper parties to their bill, supposing

(as they assert) that these parties were alive, they might have had the answers under oath of both Lambell and Mrs. Foulkes. This complaint, as well as the allegation of fraud in their bill, needs no answer but the circumstances under which complainants begun and have prosecuted this suit, since neither is supported by a particle of evidence.

The complainants have made allegations of fraud, and have offered no evidence whatever to sustain them. "Unfounded allegations of fraud are discouraged, and where the complainant introduces them into his bill and fails to establish them, he will debar himself in general from other relief to which the facts stated might otherwise have entitled him."

Price *vs.* Berrington, 3 M. & G., 481.
Eyre *vs.* Potter, 15 How. U. S., 56.
Fisher *vs.* Boody, 1 Curtis, 211.

We cannot better dismiss the consideration of this point than with the words of Mr. Justice Story, delivering the opinion of this court in Prevost *vs.* Gratz, 6 Wheat., p. 498:

"Fraud or breach of trust ought not lightly to be imputed to the living, for the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear beyond a reasonable doubt."

VII.

The reasons why the court below dismissed the bill do not appear in the record. Appellants therefore, are not warranted in saying that it was solely on the ground of *laches*. The case was heard on auditors report, and exceptions thereto (Rec. p. 60). The exceptions are in artificially drawn.

Exceptions to reports of masters in chancery are in the

nature of a special demurrer, and the party objecting must point out the error, otherwise the part not excepted to will be taken as admitted.

Story *vs.* Livingston, 13 Pet., 366.

The auditor reported against complainants, not on the ground of *laches*, but because the testimony was "incomplete, vague and indefinite." P. 45.

There is no competent evidence whatever offered by complainants in support of their claims. The answer admits the *execution* on the day named of the deed of trust as exhibited with the bill, but expressly denies that complainants are unpaid creditors.

The act of assembly of Maryland, 1715, (ch. xxiii, sec. 6,) provides that no bond or other specialty "shall be good and pleadable or *admitted in evidence* against any person or persons after the principal debtor and creditor have been both dead twelve years, or the *debt or thing in action above twelve years standing.*" There is a saving clause for infants, &c., and "persons beyond seas," giving them five years after such impediment is removed.

By act of Congress (March 3, 1865, 13 Stats., p. 532,) all exceptions which may be replied or relied on by persons beyond the District are expressly abrogated. (See Revised Stats., sec. 466.)

Hogan *vs.* Kurtz, 94 U. S., 778.

By the peculiar wording of the 6th section of the Maryland act above cited, it will be seen that, so far as this section is concerned, it is not a statute of limitations for the bringing of actions. The appellants contend that it is as to this section, and cite 4 Har. & J., 541, and 10 Gill & J., 62.

The first of these cases was an action on a testamentary bond, and was governed by the act of 1729, ch. 24, sec. 21, cited by counsel in the case, which provides "that all actions upon testamentary bonds shall be commenced within twelve years after the passing of said bonds and

not after," which is clearly an act of limitations for the bringing of actions.

The other case cited was an action of assumpsit, and of course the debt or thing in action was not a bond or specialty. It is true that it was there held that for an express promise to pay a debt, once represented by a specialty, the specialty itself could be adduced in evidence for the purpose of showing a consideration for the promise. In the present case there is no averment of any such express promise made by Walker, and the deed is sought to be relied on *as a specialty*, though of more than twelve years standing.

More than this, the specialty sought to be relied on in appellants' brief as establishing an indebtedness denied by the answers, has never been put in evidence. Only a copy from the records, which shows on it face that it was not recorded within six months, as it must have been to make a copy supply the proof of the original.

The complainants attempt to prove by themselves their transactions with Walker, deceased, to which objection was interposed. This testimony is clearly incompetent.

15 Statutes at Large, 533.

Hume *vs.* Beale's Exec., 17 Wall., 349.

If the deed itself were good, and pleadable, and admissible in the evidence, and were, of itself, as claimed by appellants, proof of the debts in the schedule named, this would not enhance the value of the share of any complainant in the proceeds of this property to such a degree that any share would in value exceed the jurisdictional amount of $2,500.

VIII.

In a bill like the present, the administrator of Walker is a necessary party. The complainants are aware of this, for they name as defendant, Paris Walker, the administrator; but he is a non-resident administrator, deriving

his office from a foreign tribunal, and as such, he cannot be sued here.

Vaughan *vs.* Northrup, 15 Pet., 1.

The deed from Walker to Willett gives the surplus to Walker, his executors, administrators, and assigns, and that partnership property, consisting of real estate, shall be treated as personalty, and in that way made descendible to the administrator. See Collyer on Partnership, § 137 *et seq.*, and cases there cited.

Conclusion.

We have been embarrassed in this discussion by the fact that appellants, in their brief filed, have stated various matters not even suggested by the record, and upon these matters have based, not only arguments, but reflections upon the defendants and their case.

We trust, however, that without committing a like breach of propriety, we have successfully refuted the positions of the appellants, and have shown that this is a case where a court of equity must remain passive, and refuse to lend its ear to complaints uttered against the dead by those who have slept upon their rights, and that these complainants, if they have or ever have had any rights which a court of equity can enforce, have not presented them in such form, and supported them with such evidence, as to warrant the granting of any relief in the premises.

We respectfully submit that the court below did right to dismiss the bill with costs.

GEORGE F. APPLEBY,
CALDERON CARLISLE,
For Appellees.

Supreme Court of the United States.

No. 211.

WELLINGTON GODDEN ET AL., APPELLANTS,

vs.

MARY A. S. KIMMELL. ADM'X, ET AL., APPELLEES.

MOTION TO DISMISS APPEAL.

Now come the appellees in the above entitled cause, by George F. Appleby, their solicitor, and move the court to dismiss the appeal in this case, on the ground that this court has no jurisdiction thereof, because the amount in controversy does not exceed $2,500, as required by the 4th and 5th sections of the act of Congress of February 25th, 1879, increasing the jurisdictional amount from $1,000 to "an amount exceeding $2,500," as to District of Columbia cases.

In support of this motion we maintain:

I. That the above cited act in changing, by its 4th section, the jurisdictional amount, and, by its 5th section, repealing former acts, inconsistent with the provisions of the new act, effectually disposes of the said appeal.

Ex parte McCardle, 7 Wallace, and cases there cited.

II. That the *several* claim of each appellant, and not their joint claims, is a test of the jurisdictional amount.

See 12 How., 360, Rich *et al. vs.* Lambert *et al.*

5 Wall., 210, Leaver *vs.* Bigelow.

This court does not know, from the record, whether or not the value of the matter in dispute is sufficient to give it jurisdiction. The *interest* of Walker, in the *firm* of Walker & Kimmell, as conveyed to Willett, is not known, and cannot be determined, unless an account of their partnership transactions, going back farther than 1842, shall be first taken.

According to the theory of the complainants, as appears by their exceptions to the auditor's report, each creditor is entitled to a lien on the property described in the bill of complaint for the amount of his claim, "*as stated in the sehedule of the Walker deed.*"

That schedule can have no value for any purpose, except as explained by the deed, as being, in some sense, part of it. The deed to which it is annexed, provides for the payment of the schedule creditors *pro rata*, and since these claims aggregate more than $186,000, (none of them being paid, according to complainants,) each creditor has an interest in the property, after the payment of the partnership debts of Walker & Kimmell, *as his claim is to* $186,000.

Suppose, *argument gratia*, that the partnership debts are all paid. There is nothing in the record to show the value of the property except the deed, which shows that lot 16 cost less than $5,000. (Rec., p. 17.) The moiety of this would be less than $2,500, and we have $186,000 to be paid out of $2,500. Certainly, no creditor having a claim sufficient in amount, as stated in the schedule, can, under the provisions of the deed, show an *interest* in the *entire property*, sufficient in value to entitle this court to exercise jurisdiction. Take, for instance, the aggregate claim of Edmund Davenport & Co., ($15,600 in round numbers), and their claim is one out of perhaps three exceeding, as stated stated in the schedule, $2,500; their interest is something less than a twetfth of the whole amount secured, which would require the value of Walker's interest, in the firm

of Walker & Kimmell, to exceed thirty thousand dollars. All the inferences most favorable to the claimants, from the very meagre testimony in the case, being taken as positive proof, *argumenti gratia*, and supposing the charge of fraud established, and the property conveyed away to be reconverted into firm assets, and including rents and profits for all the property, to this day, could not bring Walker's interest, even before any settlement of the partnership liabilities, above $24,603, and one-twelfth of this would be $2,050.25.

There is, then, no claimant whose interest in this *unknown* and *unascertainable* interest of Walker in the firm of Walker & Kimmell, is sufficient in value to maintain this court's jurisdiction; for, although we do not know the value of that so-called Walker interest, we have shown above that it is impossible, under the most extravagant pretensions of the complainants, that the value of the interest of by far the largest claimant should exceed $2,500.

Failing the general ground above stated, on which we move to dismiss the appeal in this case:

We move to dismiss the appeal of Godden and Apperson, because they did not appeal from the special term of the court below to the general term. Rec., p. 61.

We are informed by counsel for appellants that the names of Godden and Apperson were inserted by a clerical error in the record before this court, and that they do not regard said Godden and Apperson as appellants.

We move to dismiss the appeal taken by F. H. Deane, jr., administrator of F. H. Deane, deceased; Peter J. Crew, administrator of Cornelius Crew, deceased; John A. Hutcheson, administrator of A. B. Hutcheson, deceased; James Gardiner, executor of Alexander Hill, deceased; Philip P. Winston, Hinton H. Marshall, and James C. Johnson, because their claims severally do not exceed the value of $2,500.

For the proposition that even if several of the appel-